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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1275

AL STAR, as Manager & President of FAYETTE NEWS CENTER and GAYETY BOOKS
Petitioners

v.

CHARLES L. BENTON, individually and as Director of Finance, City of Baltimore; WILLIAM DONALD SCHAEFER, Individually and as Mayor of the City of Baltimore; GEORGE L. RUSSELL, JR., Solicitor for the City of Baltimore; and JOHN A. LUETKEMEYER, JR., Treasurer of the City of Baltimore
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

How Federal Questions Are Presented 11

Reasons for Granting the Writ 12

Conclusion 44

TABLE OF CITATIONS

Cases

Ashton v. Kentucky, 384 US 195 21

Avon 42nd Street Corp. v. Myerson,
352 F. Supp. 994 (1972) 24,35

Baltimore City v. Stuyvesant Ins. Co.,
226 MD 379 8,18

Bantam Books Inc. v. Sullivan, 372 US 58 13,34,43

Bates v. City of Little Rock, 361 US 516 34

Blount v. Rizzi, 400 US 410 30

Broadway Distributors Inc. et al v. Honorable
Kevin White, et al, 307 F. Supp. 1180 33,34

Butler v. Michigan, 352 US 380, 383 34

Cantwell v. Connecticut, 310 US 418 15,20

Carroll v. President & Commissioner of Princess Anne,
89 S. Ct. 347 (1968) 26,35

POOR COPY

Page

Chicago G.P.R. Co. v. Basham, 249 US 164 3
Chicago Rock Island & Pacific Co. v. Brown,
229 US 317 3
Cox v. Louisiana, 379 US 536 15
Cox v. New Hampshire, 312 US 569 16
Department of Housing & Community Development v. Ellwest
Stereo Theater, 263 MD 678, 284 A2d 406 6,35
Dillon v. Municipal Court, CAL 484 P 2d 945 35
414 Theaters v. Murphy, CA 2 (1973) 35
Freedman v. Maryland, 380 US 51 13,29,30,31,35
Gall v. Lawler, 322 F. Supp. 1223 35
Gannett Co. v. City of Rochester, 330 NYS 2d 648 . . .29,35
Gelling v. Texas, 343 US 960 15
Gonzales v. Ghingher, 218 MD 132 7
Gonzalez v. Ghinger, 145 Md. A2d 769 23
Grayned v. City of Rockford, 92 S. Ct. 2294,
408 US 104 (1972) 25
Griffin v. Mauney, 346 F. Supp. 545 35
Grosjean v. American Press Co., 297 US 233 16,39
Hague v. C.I.O., 307 US 496 14
Herndon v. Lowry, 301 US 242, 81 Led 1066,
57 S. Ct. 732 21
Interstate Circuit v. Dallas, 390 US 676 15,19,20,24
Jodbur Cinema, LTD. v. Frank A. Sedita, et al, 309
F. Supp. 868 30
Jones v. Opelika, 316 US 584, 600 15
Joseph Burstyn, Inc. v. Wilson, 343 US 495 14
Keyishian v. Board of Regents, 385 US at 604,
17 Led 2d at 641 20,21
Kingsley Books Inc. v. Brown, 354 US
436 (1957) 31
Kunz v. New York, 340 US 290 15
Largent v. Texas, 318 US 418 15
Lovell v. Griffin, 303 US 444 14,16
Louisiana ex. rel. Gremillion v. NAACP, 336 US 293,
6 Led 2d 301, 81 S. Ct. 1333 19
Marcus v. Search Warrant, 367 US 717, 730, 731,
6 Led 1127, 1135, 1136, 81 S. Ct. 1708 44
Marks v. City of Newport, Kentucky, 344 F. Supp. 675 . .35
Marsh v. Alabama, 326 US 501 15

BLEED THROUGH

Page

Mature Enterprises v. Bess Myerson, 72 CIV 5499 35
Mayor & City Council v. Charles Book Center & Block News, Inc. Circuit Court of Baltimore City, Case A-5 1572 .35
NA.A.A.C.P. v. Alabama, 377 US 288 34
N.A.A.C.P. v. Button, 371 US 415 (1963) 19,21
Near v. Minnesota, 283 US 697, 75 Led 1357, 51 S. Ct. 625 19
Niemotko v. Maryland, 340 US 268 15,20,35
New York v. S & H Book Shops Inc. 41 A2d 637 (1973) .29
People v. Bunis, 210 NY 2d 505 35
People v. Mitchell, 74 Misc. 2d 1053 (1973) 25
Perrine v. Municipal Court, 488 P2d 648 35
Plematis v. City of Daytona Beach, Fla., 340 F. Supp. 617 25,35
Saia v. New York, 334 US 558 15
Schneider v. Irvington, 308 US 147 15
Schneider v. State, 308 US 147, 162 84 Led 155, 165, 60 S. Ct. 146 19
Seattle v. Bittner, 505 p.2d 126 35
Shelton v. Tucker, 364 US 479 5 Led 2d 231, 81 S. Ct. 247 19
Shuttlesworth v. Birmingham, 394 US 147 (1969) 14,32
Smith v. California, 361 US 147, 151, 4 Led 2d 205, 210, 80 S. Ct. 215 21
Sokolic v. Ryan, 304 F. Supp. 213 (1969) 32
Soof v. City of Highland Park, 186 N.W.2d 361 22
Southeastern Promotions Ltd. v. Conrad, ___ US ___ 95 S. Ct. 1239 29,30
Speiser v. Randall, 357 US 513 16,20
Staub v. Baxley, 355 US 313 15,28
Strasser v. Doorley, 309 F. Supp. 716 (D.R.I. 1970) 39
Stromburg v. California, 283 US 359, 75 Led 1117, 51 S. Ct. 532, 73 ALR 1484 21
Superior Films, Inc. v. Department of Education, 346 US 58 15
Talley v. California, 362 US 60 34
Teitel Film Corp. v. Cusack, 390 US 139 (1968) 31
Tucker v. Texas, 326 U.S. 517 15
U.S. v. CIO, 335 US 106, 142, 92 Led 1849, 1871, 68 S. Ct. 1349 21

POOR COPY

Page

Winters v. New York, 333 US, 507, 509, 510, 517, 518, 92 Led 840, 846, 850, 851, 68 S. Ct. 665 21
Wulp v. Corcoran, 454 F.2d 826 39
Zwickler v. Koota, 389 US 288 24

Statutory Provisions

Federal
Title 28, U.S.C., Section 1254 3
Title 28, U.S.C., Section 1331 5
Title 28, U.S.C., Section 1343 5
Title 28, U.S.C., Section 2272 5
Title 28, U.S.C., Section 2291 5
Title 42, U.S.C., Section 1983 5

Maryland
Article 15, Baltimore City Code,
Section 23 27
"Licenses" generally 4,17,36
"Licenses" Section 71 3,5,6,9,11,18,23,26,36
"Licenses" Section 22 7,13,18,27
Article 32, Baltimore City Code,
Section 149 4,5,10,36

Rules

Rule 57, Federal Rules of Civil Procedure 5
Rule 65, Federal Rules of Civil Procedure 5

Constitutional Provisions

Amendment One 3,4,10,11,12,26
Amendment Four 11
Amendment Five 11
Amendment Fourteen 3,4,11,12

BLEED THROUGH

INDEX TO APPENDIX

Page

Memorandum and Order of District Court of Maryland . . . 1

Judgment for Costs Against Plaintiff 12

Per Curiam Opinion, Fourth Circuit Court of Appeals . . . 13

Order Denying Rehearing en-banc 14

Constitutional Provisions 16

Articles 15 and 32 Provisions, Baltimore City Code 17

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on December 23, 1975; Petition for Rehearing En Banc denied January 19, 1976.

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OPINIONS BELOW

Petitioner filed a civil action in the United States District Court for the District of Maryland on June 9, 1972, docketed as Civil No. 72–607–Y, seeking Declaratory and Injunctive Relief against Article 15, Section 71, "LICENSES," Baltimore City Code. His Honor, Joseph H. Young, by written Memorandum and Order, entered judgment in favor of the Defendants on September 26, 1973. On September 27, 1973, Judge Young entered judgment for costs against Petitioners. No specific time of entry was noted upon the Order or Judgment. This Memorandum and Order is set forth as Appendix "A" herein and the Judgment for Costs is set forth as Appendix "B" herein. These Judgments and Orders are not reported in any official published reports as yet.

An appeal was noted and timely prosecuted from those judgments to the United States Court of Appeals for the Fourth Circuit on October 12, 1973 and docketed as No. 73–2390. Oral argument was granted two years later on October 7, 1975. On December 23, 1975 the Court of Appeals affirmed Judge Young's judgment for the reasons stated by the District Court. A timely Petition for Rehearing *En Banc* was filed but was denied on January 19, 1976 and the judgment was thus final. The opinions of the Court of Appeals are not reported in any official reports as yet and are set forth as Appendix "C" herein.

JURISDICTION

The unpublished judgment of the United States District Court for the District of Maryland was entered on September 26, 1973 granting judgment for the Defendants and denying

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Injunctive and Declaratory Relief. The unpublished judgment of the United States Court of Appeals was entered on December 23, 1975 affirming the District Court judgment; Petition for Rehearing En Banc was denied on January 19, 1976 and the judgment was thus final. *Chicago G.P.R. Company v. Basham*, 249 US 164; *Chicago Rock Island & Pacific Co. v. Brown*, 229 US 317. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Is *Article 15, § 71* of the *Baltimore City Code* in conjunction with the other provisions of *Article 15* void for vagueness and overbreadth and a prior restraint upon freedom of expression imposed by reason of requiring a license upon motion picture projectors prior to the exercise of *First* and *Fourteenth Amendment* freedoms and thereby invading the area of constitutionally protected speech, press and expression without the necessary procedural safeguards and narrow, objective, and definite standards and guidelines to guide the licensing authorities unfettered-executive-discretion in requiring the license or of the refusal, suspension and revocation of the license and judicial review thereof for the administrative determination and judicial burden of proof upon the licensor contrary to the *First* and *Fourteenth Amendments?*

2. Is the license fee of each motion picture projector a prohibited tax upon the exercise of *First Amendment* rights applicable to the states under the *Fourteenth Amendment?*

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3. Did the District Court in its judgment, and by the Court of Appeals judgment, in affirming for the reasons stated by the District Court, err in substituting the District Court interpretation of the provisions of *Article 15* contrary to the interpretation placed upon it by the state courts of Maryland and all the administrative officials who construe and operate under it as well as the actual provisions of *Article 15* of the *Baltimore City Code?*

4. Is the District Court judgment affirmed by the Court of Appeals for the reasons given by the District Court in conflict with the decisions of the United States Supreme Court as well as other circuit and federal court decisions on these points?

5. Is there a subordinating state interest shown herein sufficient to invoke the police power of the state for the preservation of its citizens health, safety and welfare to require the prior restraint of a license before exercising freedom of speech, press and expression by Petitioners under the *First* and *Fourteenth Amendments?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First* and *Fourteenth Amendments* to the *Constitution of the United States* and the pertinent provisions of *Article 15* "LICENSES" and *Article 32* of the *Baltimore City Code* are set forth in Appendix "D" hereto.

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STATEMENT OF THE CASE

On June 9, 1972, the Petitioners filed a civil action in the United States District Court for the District of Maryland against the Respondents; City Officials of the City of Baltimore, charged with enforcement of *Article 15* of the *Baltimore City Code* entitled, "LICENSES" which was docketed as Civil No. 72–607Y. This action was brought pursuant to *Title 42, USC Section 1983; Title 28 USC Sections 1331, 1343, 2272* and *2291* as well as *Rules 57* and *65* of the *Federal Rules of Civil Procedure*. The Petitioners sought Declaratory Judgment that the provisions of *Article 15, Section 71* were unconstitutional as written or as construed and as applied as well as in its threatened application to them, together with Injunctive Relief to prevent the further enforcement of the licensing provisions to them, both preliminary and permanent by these city officials.

The complaint alleged and the facts disclosed at trial that these officials had sought and obtained an opinion from the City Solicitor of Baltimore on October 9, 1970 in writing concluding that any premises which contained coin-operated motion picture projection machines were theaters under *Article 32* of the *Baltimore City Code* which required a city ordinance approved by the Mayor prior to operation. Thereafter the city authorities summarily revoked all operating permits including licenses required under *Article 15, Section 71* for numerous such establishments without hearings.

Several of the establishments filed suit in the Equity Courts of the City of Baltimore and assumed the burden of

proof for reinstating their licenses and businesses. One of the establishments ultimately had their matter on appeal to the Maryland Court of Appeals, styled *Department of Housing and Community Development v. Ellwest Stereo Theaters*, 263 MD 678, 284 A2d 406, which was decided on December 13, 1971 over 1 year later. The appellate court held that the business premises was not a theater although apparently the city was motivated by a desire to rid the city of them. The revoked licenses under *Article 15* was restored without any guidelines mandated.

The city then conferred between the Director of Finance and the City Solicitor's office and a decision was made for the city to enforce *Article 15, Section 71* upon each individual projector for a license and a fee of $150.00 per year.

On March 9, 1972, less than three months after the *Ellwest* decision the city authorities sent letters to numerous such establishments demanding the obtaining of a license for each machine with payment of $300.00 per projector by assessing the fee for the prior year of 1971 also. The city authorities alleged that these projectors were classified as "or other amusement device" under the statute.

The sum assessed to Gayety Books was $2,700.00 and to Fayette News Center, $3,000.00.

The Petitioners objected and claimed they had obtained all valid business licenses required for businesses in the City of Baltimore. The City, after further demands threatened legal action. The failure to license carries a penalty of up to $100.00 for each offense. This suit then followed.

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The Director of Finance testified (Exhibit No. 1 in District Court, appendix pp 212–236 in Court of Appeals) that upon approval of the Mayor, he had full power to refuse to grant a license and to revoke any licenses previously issued (Court of Appeals Appx. 218–225) and upon the Mayor's approval had previously revoked without hearing these licenses (Court of Appeals Appx. 219, 220, 221, 224, 225) and that there were no regulations enacted for procedural guidelines in the issuance, refusal, suspension or revocation of licenses or any hearing to be granted therefore.

The Director of Finance admitted that the prior revocation of *Article 15* licenses were committed under the authority of *Section 22* of *Article 15*. The Director of Finance has the ultimate power to enforce these provisions as long as he has the approval of the Mayor. The Treasurer accounts for license revenues and has tax inspectors who physically inspect premises and forcibly remove licenses upon suspension and revocation. The Solicitor advises the Director of Finance and institutes all legal actions of enforcement.

Evidence also was presented to the District Court that on prior occasions in the enforcement of the licensing provisions that *Article 15* licenses had been refused without hearing, *Gonzales v. Ghinger*, 218 MD 132 and of summary revocations upon direction of the Mayor and Director of Finance, without hearing, of *Article 15, Section 71*, licenses for motion picture projection machines, *Department of Housing and Community Development v. Ellwest Stereo Theaters*, supra.

All of the actions of refusal and revocation were conducted under the authority of *Section 22* of *Article 15*.

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Articlee 15 "Licenses", has been upheld by the appellate courts of Maryland as being proper and sustainable under the state police powers, *Baltimore City v. Stuyvesant Insurance Co.*, 226 MD 379.

There are no standards or guidelines within *Article 15* to guide the licensing authorities' discretion in the enforcement of *Section 71* in the granting, refusal, suspension or revocation of licenses. Section 71 (g) provides the power of the Director of Finance to make, adopt, promulgate and amend rules and regulations. This power has not been exercised as yet and therefore no known regulations exist. It was also shown that the discretion of the Director of Finance to enforce this license provision upon the Petitioners did not occur until March of 1972, less than three months after the decision in *Ellwest Stereo*, supra. Judicial review must be obtained only by the one seeking the license who bears the burden of proof.

On September 26, 1973, His Honor, Judge Young, filed a Memorandum and Order granting judgment for Respondents. On September 26, 1973, judgment was entered for costs against Petitioners.

In the Memorandum and Order issued by Judge Young on September 26, 1973, the court in its finding of fact found that the ordinance is enforced uniformly and all those with coin-operated amusement devices in the city must pay the fee. It was also found that the record did not show that a tax of $150.00 was prohibitive and that the appellants did not show or allege the inability to pay the fee. The court found that this ordinance imposed the only city tax on plaintiff's business. (Slip opinion, page 3, Appx. L).

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The court found that attempts by the city to revoke permits granted under *Section 71*, to similar businesses have actually occurred. And that the parties there succeeded in enjoining the return of their arcade permits, granted under *Article 15, Section 71*. The power to revoke or to review licenses was understood by Defendant, Benton, to reside in himself upon approval of the Mayor. Although the Defendant, Benton, is the Director of Finance, and issues his own administrative opinions such as stated in the depositions, Judge Young still found that such an interpretation by Defendant Benton has not been advanced to the court by the City. (See Slip Opinion, page 4, Appx. L.) No written rules and regulations have been enacted to establish procedural guidelines for the enforcing authorities and judicial review. Judicial review on at least two occasions has been sought by parties seeking such licenses or return of revoked licenses with the burden of proof on the ones seeking licensing. No time and limits are prescribed, and no absolute right to license is contained in the statute or under any rule or regulation.

Judge Young found that the only way *Section 71* could stand, compatible with the restrictions of licensing prior to the exercise of *First Amendment* rights, (slip opinion, pp 10) was to construe the section as allowing no discretion to grant, refuse or revoke the license except as to non-payment.

The learned District Judges view is directly contrary to the holdings of Maryland Courts and the highest administrative officers in construing this ordinance. The person charged with enforcing this provision affirmatively states that he has the discretion to grant, refuse, suspend and revoke these licenses for other than non-payment and has admitted to having done so. In addition, Maryland's appellate

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court sustains the ordinance as an exercise of police powers which are regulatory in nature to preserve the health, welfare and safety of its citizens. Judge Young also found no evidence that the licensing fee was an invalid tax on *First Amendment* rights.

On appeal to the United States Court of Appeals for the Fourth Circuit, the same facts and arguments were presented.

However, in the interim from the time of the initial briefing to the time of rendering judgment on December 23, 1975, the City of Baltimore enacted an *Ordinance No. 811* on February 26, 1975 adding new *Section 149* to *Article 32*, subtitle, "Permits." This Ordinance requires each establishment that utilized motion picture projection machines (except theaters) to obtain a permit for the premises and a permit for each motion picture projector, yearly at a cost of $100.00 per projector. The applicants for these permits are required to meet certain safety and building standards.

The Petitioners have obtained their permits as required under this new Ordinance and they are valid at the present time. See Appendix "D" hereto.

On December 23, 1975, the Three Judge Panel of the United States Court of Appeals in a per curium opinion affirmed the lower court for the reasons stated by the District Court. A Petition for Rehearing En Banc was timely filed and denied on January 19, 1976. The judgement was thus final.

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HOW FEDERAL QUESTIONS ARE PRESENTED

On behalf of Petitioners the affirmative claims involving federal constitutional questions were raised in District Court by verified pleadings (Amended Complaint); 1) Claiming and alleging *Article 15* to be void on its face and repugnant to the *First, Fourth, Fifth* and *Fourteenth Amendments* in that it grants overbroad and "unfettered-executive-discretion" in the area of licensing and censoring *First Amendment* freedoms; 2) *Article 15* is unconstitutional on its face insofar as it applies to Petitioners premises; 3) It is unconstitutional as being applied in violation of Petitioners' *First, Fourth, Fifth* and *Fourteenth Amendment* rights; 4) That *Article 15* is unconstitutional and null and void on its face by reason of its attempts to place a large and exorbitant tax on the exercise of *First* and *Fourteenth Amendment* rights of Petitioners; 5) That *Section 71* of *Article 15* of the Baltimore City Code is unconstitutional and void on its face because the remainder of *Article 15* fails to provide adequate procedural safeguards to protect Petitioners' *First Amendment* rights under the *Fourteenth Amendment;* 6) That the Ordinance constitutes a "severe prior restraint" and "chilling effect" upon the exercise of Petitioners' *First Amendment* rights by reason of its granting "unfettered-executive-discretion" to the enforcement authorities and its vagueness and overbreadth and burdensome taxation contrary to the *Fourteenth Amendment;* 7) That the Defendants had entered into a plan and scheme effectuated by the new enforcement of *Article 15, Section 71* and its heavy taxation to force the termination of Petitioners' exhibition of motion picture films.

On appeal the Petitioners presented the Issues for Review as; 1) Is *Article 15, Section 71* of the *Baltimore City Code* an

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invalid "prior restraint" creating an "impermissible chilling effect" upon their *First Amendment* rights under the *Fourteenth Amendment;* 2) Is *Article 15, Section 71* impermissibly overbroad and void for vagueness in subjecting the exercise of *First Amendment* rights to regulation of licensing contrary to the *First* and *Fourteenth Amendments;* 3) Is the Ordinance void for vagueness and overbreadth by reason of its failure to provide adequate procedural guidelines to guide the licensing authorities and for leaving to the "unfettered-executive-discretion" whether a license will be issued or withheld or suspended or revoked without hearing contrary to the *First* and *Fourteenth Amendments.* 4) Is the Ordinance herein repugnant to the *First* and *Fourteenth Amendments* in that the burden of proof and seeking judicial review is upon Petitioners and those seeking the exercise of *First Amendment* rights; 5) Is the licensing fee herein an impermissible tax upon the exercise of *First Amendment* rights under the *Fourteenth Amendment;* 6) Is there a subordinating state interest sufficient to invoke the police power of the state for the health, safety and welfare of its citizens to require the prior restraint of speech and press by licensing under the *First* and *Fourteenth Amendments.*

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals affirmed the judgment of the United States District Court for the District of Maryland for the reasons stated by the District Court.

The reasons advanced by the District Court and decision thereon are in conflict with applicable decisions of this court and other courts of appeal. The decision rendered is in

conflict with applicable decisions of the State of Maryland and the executive-administrative authorities charged with construing and enforcing this law.

The District Court found, and adopted by the Court of Appeals, that the city had previously revoked licenses under this Section, of motion picture projectors, as requested by the Mayor and the power to revoke or refuse to license resides in the Director of Licenses upon the Mayor's approval under *Section 22* of the Article. The District Court, even with this admission, rejected that admission and found that the Defendants had not advanced proof by judicial decision or administrative opinion relied on by the city. Clearly a factual allegation underpinning constitutional claims when conceded and admitted to by the Defendants, are the evidence of the case which cannot be rejected by the District Court and the court's determination of the applicable administrative law substituted for that of the states and the administrative officers charged with administering it.

I.

PRIOR RESTRAINTS IN THE AREA OF FIRST AMENDMENT FREEDOMS BEAR A HEAVY BURDEN OF JUSTIFICATION

To name but two, of the many cases wherein the Supreme Court of the United States has stated that any system of prior restraints of expression comes to that court bearing a heavy presumption *against* constitutional validity see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 and *Freedman v. Maryland*, 380 U.S. 51.

Bantam Books dealt with a Rhode Island commission which reviewed books; *Freedman* with movie censorship. A municipal ordinance licensing coin operated film viewing machines is as much a prior restraint on the dissemination of presumptively protected *First Amendment* materials as the commission in *Bantam Books* and the Board of Censors in *Freedman.* In fact, this system is even more of a prior restraint because it affects not only constitutionally unprotected obscenity but also those forms of expression which are protected.

The case of *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, held that motion pictures were within the ambit of *First Amendment* protection.

The Supreme Court of the United States in the case of *Shuttlesworth v. Birmingham,* 394 US 147 (1969) said:

> "This ordinance (referring to a municipal ordinance requiring parade permits) as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective and definite standards to guide the licensing authority is unconstitutional.[2] 394 US at 150, 151.

The court under footnote number two cited the following list of cases:

Lovell v. Griffin, 303 US 444

Hague v. C.I.O., 307 US 496

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Schneider v. Irvington, 308 US 147, 163-165

Cantwell v. Connecticut, 310 US 418

Largent v. Texas, 318 US 418

Jones v. Opelika, 316 US 584, 600 (Stone, C.J., dissenting), 611 (Murphy, J., dissenting), vacated and previous dissenting opinions adopted per curiam, 319 US 103

Marsh v. Alabama, 326 US 501

Tucker v. Texas, 326 US 517

Saia v. New York, 334 US 558

Kunz v. New York, 340 US 290

Niemotko v. Maryland, 340 US 268

Joseph Burstyn, Inc. v. Wilson, supra

Gelling v. Texas, 343 US 960

Superior Films, Inc. v. Department of Education, 346 US 587

Staub v. Baxley, 355 US 313

Cox v. Louisiana, 379 US 536

Interstate Circuit, Inc. v. Dallas, 390 US 676

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A brief review of some of the many decisions in the area of licensing and *First Amendment* freedoms will immediately show how seldom this presumption against constitutional validity has been overcome.

In *Grosjean v. American Press Co.*, 297 US 233 the Court struck down a gross receipts license tax which was required for publishing or advertising in any newspaper or motion picture.

In *Lovell v. Griffin*, 303 US 444 a municipal ordinance prohibiting distribution of circulars or literature of any kind whether given away free or sold was struck down as being unconstitutional on its face as violating the freedom of the press.

In *Murdock v. Pennsylvania*, 319 US 105 a municipal ordinance imposing a flat license tax for the privilege of soliciting or canvassing when applied to persons engaged in the dissemination of their religious beliefs through the sale of books and pamphlets by house to house solicitation was held to be an unconstitutional invasion of the rights of freedom of religion and of speech and press.

The denial of a tax exemption was held to be an effective limitation and penalty of certain forms of speech in *Speiser v. Randall*, 357 US 513.

However, in *Cox v. New Hampshire*, 312 US 569 a statute requiring a parade license and payment of a fee therefore was upheld. The reason being that by the statute as construed by the state courts the licensing authorities were not invested with arbitrary discretion to issue or refuse the

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licenses. They were strictly limited to consideration of the time, manner, and place of the parade or procession for the purpose of conserving the public convenience and of affording an opportunity to provide proper policing. The fee was also permissible because it was intended merely to meet the public expenses of maintaining public order incident to the parade or procession.

Of course that is not true in this case. For here the fee is tremendously out of proportion for policing needs. It is also admitted by the respondents that one purpose is to raise revenues.

II.

ANY SYSTEM OF LICENSING TOUCHING FIRST AMENDMENT FREEDOMS MUST BE NARROWLY DRAWN AND HAVE DEFINITE, OBJECTIVE STANDARDS TO GUIDE THE LICENSING AUTHORITY.

The Ordinance in *Section 71 (g)* grants to the Director of Finance the power to make, adopt, promulgate and amend such rules and regulations in his discretion as he deems necessary. No other standards or guidelines are set forth in the Ordinance.

The Ordinance in *Section 22* grants to the Director of Finance full power to refuse to grant licenses and when directed to by the Mayor, the full power to revoke licenses previously granted. No other standards or guidelines are set forth.

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The Director of Finance testified that he has such powers and that he did exercise such powers and revoked licenses of motion picture projectors under this Ordinance on prior occasions by sending out the Tax Inspector to take them off the walls of premises when requested by the Mayor. He has operated under such interpretation of this Ordinance.

The Maryland Court of Appeals has sustained the requirement of prior licenses under *Article 15* as a valid exercise of the state police power delegated to Baltimore City, *Gonzales v. Ghingher*, supra; *Baltimore City v. Stuyvesant Insurance Co.*, 226 MD 379. See also *Department of Housing & Community Development v. Ellwest Stereo Theaters*, supra.

All of this evidence and testimony by the Director of Licensing was given to the District Court below. The District Court, however, apparently rejected the courts of Maryland and the enforcing officer who construes and administers the statute. For the District Court after conceding the above found that;

> "However, such an interpretation of Section 22 and its relationship to *Section 71* is not advanced in any judicial decision or administrative opinion *relied on by the city*, slip opinion, pp 4 (emphasis supplied)."

The District Court in its conclusion of law utterly rejected the evidence and the Respondents' construction of the law and stated that in order for the Ordinance to stand it must be construed as having no discretion as stated by the Respondents and claimed by Petitioners. Thus the District Court substituted its judgment for that of the City.

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The Supreme Court of the United States in *Shuttlesworth v. Birmingham,* supra, stated:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the constitution guarantees contingent upon the uncontrolled will of an official as by requiring a permit or license which may be granted or withheld in the discretion of such official is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms' *Staub v. Baxley,* 355 US 313, 322 2 L Ed. 2d 302, 311, 78 S. Ct. 277" 394 US at 151.

> In *NAACP v. Button,* 371 US 415 (1963) the Court said,

> "Broad prophylactic rules in the area of free expression are suspect. See e.g. Near v. Minnesota, 283 US 697, 75 L Ed 1357, 50 S. Ct. 625; Shelton v. Tucker, 364 US 479, 5 L ed 2d 231, 81 S. Ct. 247; Louisiana ex. rel. Gremillion v. National Asso. for Advancement of Colored People, 366 US 293, 6 L ed. 2d 301, 81 S. Ct. 1333. Cf. Schneider v. State, 308 US 147, 162 84 L. ed. 155, 165, 60 S. Ct. 146. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" 372 US at 438.

Also quoted in *Interstate Circuit v. Dallas,* 390 US 676 at 682.

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The Court in *Button* went on to state:

> "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms" 371 US at 438.

At 371 US 433 the court also stated that:

> "These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California, supra (361 US at 151-154); Speiser v.Randall, 357 US 513, 526, 2 L ed 2d 1460, 1472, 78 S. Ct. 1332. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 US 296, 311, 84 L ed. 1213, 1221, 60 S. Ct. 900, 128 ALR 1352."

Quoted in *Keyishian v. Board of Regents*, 385 US at 604 17 L. ed 2d at 641.

In the case of *Interstate Circuit v. Dallas*, 390 US 676 (1968) the court said,

> "... the absence of narrowly drawn, reasonable and definite standards for the officials to follow, Niemotko v. Maryland, 340 US 268, 271 95 L Ed. 267, 270, 71 S. Ct. 325 (1951) is fatal" 390 US at 690.

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The Court in *Keyishian v. Board of Regents of New York*, 385 US 589 (1967) stated,

> "We emphasize once again that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms' N.A.A.C.P. v. Button, 372 US 415, 438, 9 L ed. 2d 405, 421 835 S. Ct. 328," 385 US at 603, 604

The mortal failing of ordinances and statutes in this area and the charge under which most fail to measure up to the requisite Constitutional standards is vagueness.

On this point the Supreme Court in *Ashton v. Kentucky*, 384 US 195 stated as follows:

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." 384 US at 200.

Similarly in *N.A.A.C.P. v. Button*, supra at 432 the court said,

> "... standards of permissible statutory vagueness are strict in the area of free expression. See Smith v. California, 361 US 147, 151, 4 L ed. 2d 205, 210, 80 S. Ct. 215; Winters v. New York, 333 US 507, 509, 510, 517, 518, 92 L ed 840, 846, 847, 850, 851, 68 S. Ct. 665; Herndon v. Lowry, 301 US 242, 81 L ed 1066, 57 S. Ct. 732; Stromberg. v. California, 283 US 359, 75 L ed 1117, 51 S. Ct. 532, 73 ALR 1484; United States v. CIO, 335 US 106, 142, 92 L ed. 1849, 1871, 68 S. Ct. 1349 (Rutledge, J., Concurring)."

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The Court in *Interstate Circuit v. Dallas*, supra at 683 pointed out that;

> "The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing."

While it may be noted that none of the cases cited or quoted from herein specifically dealt with the problem of amusement device licenses for coin operated movie machines the principles and standards set forth are as applicable in the instant case as in the fact situation where they were announced.

A 1971 case in the Michigan State Court of Appeals styled *Soof v. The City of Highland Park*, 30 Mich. App. 400, 186 N.W. 2d 361 did deal with the problem of licensing coin operated motion picuture machines. In that case the appellants were denied a license to install four coin operated motion picture devices required by Highland Park Municipal Ordinance No. 765. The Court held the ordinance unconstitutional on its face. The Court at 186 N.W. 2d 365 stated their reasons as follows:

> "It is unncessary for this court to consider the motives which induced the adoption of the instant ordinance. Suffice it to say that the ordinances drafted lacks the precision required of an ordinance which restrains protected First Amendment rights. The discretion bestowed upon the authorities responsible for granting or denying a license under this ordinance is too profuse to satisfy constitutional requirements. Nor, can the constitutional defects be overcome simply because

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> the ordinance exists under the semblance of regulation of business activity.
>
> Having determined that the ordinance is unconstitutional on its face, we need not speculate as to whether the character of the Petitioners or the condition of their business premises would be sufficient to warrant a denial of their application for a license under a properly drafted ordinance. It is not within our province to draft legislation. We merely reiterate that any ordinance or statute which provides a prior restraint on *First Amendment* rights needs precise standards, capable of objective measurement. Additionally, the standards must bear a reasonable relation to legitimate police powers."

Respondents contend that § *71 of Article 15* is not void for vagueness and thus not unconstitutional. And yet, § *71, subparagraph (a) (1)* does not mention that coin-operated film projector machines fall under the classification of "coin-operated amusement devices." That these machines do fall into that category was decided upon solely by the discretion of the Respondents. The city also candidly admits that there are no procedural guidelines or regulations.

As the Maryland Court of Appeals ruled in 1958, in *Gonzalez A. v. Ghingher,* 145 A2d 769, the "exercise of police power by a municipality for regulating or licensing of amusements must be done in a reasonable way and not in an arbitrary or capricious manner." That court ruled that an applicant for a license must be given sufficient reasons for rejection only.

And further in *People v. Mitchell,* 74 Misc. 2d 1053, (1973, Criminal Courts of New York City,) the Court, Hertz, J. stated as follows at page 1056, 1057;

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> "Vague or overly broad licensing systems impinging on First Amendment freedoms have invariably been invalidated by courts faced with such laws. The court in *Soof v. City of Highland Park* (30 Mich. App. 400) asserted that a licensing ordinance which lacks precise standards and thus is incapable of objective measurement is inherently dangerous when First Amendment rights are involved, because the exercise of the protected rights are made entirely dependent upon the discretion of the licensing authority so that the situation becomes fraught with the rights of expression will be unconstitutionally restrained."

And in *Zwickler v. Koota* (389 US 241) citing *NAACP v. Alabama,* (377 US 288), the Supreme Court declared that " 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' ".

Further in *Interstate Circuit, Inc. v. City of Dallas,* 390 US 676, 88 S. Ct. 1298 (1968) in which a licensing ordinance that classified films into different categories was found invalid, the Court stated:

> "Vice of vagueness in censorship legislation is particularly pronounced where expression is sought to be subject of licensing." 390 US at 683.

An invalid licensing ordinance is found again in *Avon 42nd Street Corp. v. Myerson,* 352 F. Supp 994 (1972), where the United States District Court for the Southern District of New York stated:

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"In view of First Amendment protection of the distribution of motion picture films, no state or municipality may significantly interfere therewith". 352 F. Supp. at 997

* * * * * * * *

"Motion picture licensing ordinance was invalid under the First Amendment for failure to provide ascertainable standards by which commissioner was to exercise his power to suspend or revoke licenses". at 998

* * * * * * * *

"Burden is upon the state to insure that any regulatory system involving prior restraints upon speech is narrowly drawn". at 999

Vague licensing ordinances appeared in federal courts again in *Plematis v. City of Daytona Beach, Fla.*, 340 F. Supp. 617, where it was held that "a prior restraint of a license on freedom of the press, *without narrow, objective, and definite standards* to guide licensing authority, is unconstitutional". (emphasis supplied)

And the Supreme Court, in *Grayned v. City of Rockford*, 92 S. Ct. 2294, 408 US 104 (1972) held that;

(1) "It is a basic principle of due process that an enactment is void for vagueness if its prohibitors are not clearly defined."

(2) "If arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit* standards for those who apply them."

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(3) "A clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct."

(4) "In assessing the reasonableness of a regulation of expressive activity, the court must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the state's legitimate interest."

(5) "Free expression must not in the guise of regulation, be abridged or denied."

And in *People v. Mitchell*, supra, the court noted that the United States Supreme Court frequently emphasized that "a system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity". See also *Carroll v. Princess Anne*, 89 S. Ct. 347 (1968).

And for further proof that *Article 15, Section 71* is void for vagueness as well as in its application upon *First Amendment* freedoms and its lacking in adequate procedural safeguards, Petitioner states that the said ordinance has been law for years, and yet only because other statutes have been found non-applicable to coin-operated film projector machines, the Respondents have attempted to license these machines under this questionable ordinance. This is licensing by impulse, if not by pure improvisation which is not characteristic of our heritage but of the oppressive colonial rule of King George III and his aides more than 200 years ago.

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The precedents for holding licensing statutes, like the one in question, which are vague and lack adequate procedural safeguards are numerous in the annals of American law. From the Supreme Court of the United States down to virtually all of the State Courts and the Criminal Court of New York City, judges and judicial panels have consistently held that licensing statutes, especially those controlling *First Amendment* rights, which vest broad discretionary powers to licensing authorities are repugnant to the American conscience.

As *People v. Mitchell*, supra, stated at page 1059;

> "These two sections [referring to the licensing ordinance deemed unconstitutional] give absolutely unlimited discretion to the Commissioner of Common Affairs to establish any and all conditions he might wish for the granting of the required license and he may do so without any standards whatsoever to guide him. The words of the ordinance would, in fact, permit him to set such terms and conditions as would make it impossible for any applicant to meet."
>
> * * * * * * *
>
> "The ordinance in question provides such uncontrolled discretion in the hands of the Commissioner that he could, in effect, force all similar establishments out of business, should he so choose".

Further, *Article 15* itself contains the provision at *Section 23* that vests wide discretionary powers in city officials to enforce the entire Article. *Section 22* states;

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> ". Refusal, revocation of license. Upon the approval of the Mayor, the Treasurer shall have full power and authority to refuse to grant licenses under the provisions of this Article, and also, when directed by the Mayor, shall have full power and authority to revoke any license granted by virtue of the Article."

The above section has already been used in an overbroad and capricious manner in the matter of *Gonzales v. Ghinghher*, supra, where the refusal of the Treasurer to issue a license for a bloodless bullfight, because of his assertion that the bullfight would not be understood by the citizens was held to be arbitrary and unreasonable. This sort of vague section raises the spector of, once having confirmed the application of coin-operated motion picture machines to *Article 15*, city officials could then attempt to invoke *Section 22* against Plaintiff. This was done in summarily revoking this license in the *Ellwest* case supra.

Thus, the Supreme Court, when faced with a similar type ordinance in *Staub v. City of Baxley*, (355 US 313), where a Georgian city's ordinance making it illegal to solicit members for an organization without a permit was held unconstitutional, stated at page 325 that the ordinance

> "prohibiting solicitation of members for organization without a permit and making it discretionary with the Mayor and City Council as to whether to grant a permit, without any definitive standards or other controlling guides, is invalid as abridging freedom of speech".

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Further, the Court stated that;

> "An ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms".

See also *Interstate Circuit, Inc. v. Dallas*, supra, and *Gannett Co. v. City of Rochester*, 330 NYS 2d 648 and *Freedman v. Maryland*, 380 US 51.

And in *New York v. S. & H. Book Shop, Inc.* 41 A.2d 637 (1973), the Court held that "a law subjecting the exercise of First Amendment freedoms to prior restraint of license, without narrow, objective, and definite standards to the guide licensing authority, is unconstitutional".

And finally, in *People v. Mitchell*, supra, it was held that "statutes requiring licenses for coin-operated motion picture shows in bookstores which statutes give broad discretion to Commissioners of Consumer Affairs of New York City are unconstitutional infringements on First Amendment rights, prosecutions for failure to obtain licenses are dismissed.

This court as recently as March 18, 1975 in the decision styled *Southeastern Promotions, LTD v. Conrad*, US , 95 S. Ct., 1239, considered the power of a city to grant or deny a license (use permit of municipal facilities) in their discretion without the necessary procedural safeguards to obviate the dangers of a censorship system.

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Mr. Justice Blackmun speaking for this court held that it presented the common thread of statutes and ordinances requiring licensing prior to dissemination. This requirement for expression created too great a danger of censorship and abridgment of these freedoms where officials have unbridled discretion and were operating without acceptable standards.

Another infirmity here in their Ordinance in the area of vagueness and overbreadth is the "prior restraint" inherent in the Ordinance for judicial review of the determination of licensing authorities. Under the statute any refusal to license or any suspension or revocation of a previously issued license must be reviewed in a judicial proceeding of "Mandamus" instituted and proved by the one seeking licensing. See *Ellwest Stereo*, supra. Otherwise the revocation stands.

This burden of proof and seeking of judicial review of an adverse determination of a licensing official is not properly upon the applicant but must be upon the licensing authorities. *Freedman v. Maryland*, 380 US 51; *Southeastern Promotions LTD v. Conrad*, supra, 95 S. Ct. at 1247; *Blount v. Rizzi*, 400 US 410.

In the case of *Jodbor Cinema, Ltd. v. Frank A. Sedita, et al*, 309 F. Supp. 868, *out of the United States District Court for the Western District of new York*, the court there stated:

> "The United States Supreme Court has declared as unconstitutional laws which restrict the exercise of one's First Amendment freedoms without narrow, objective and definite standards to guide the authority responsible for licensing the exhibition of

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films. In *Freedman v. Maryland*, 380 US 51 (1965), the Supreme Court reversed a Maryland State court conviction for violation of a provision in the Maryland motion picture censorship statute, making it unlawful to exhibit a motion picture without first having obtained a license. In protecting the exhibition of *one* motion picture, the court held the Maryland statute violated the exhibitor's constitutional freedom of expression in these respects: (1) Upon the censor's disapproval of the film, it became the exhibitor's burden to initiate judicial proceedings to persuade the court that the film is protected expression; (2) Once the censor had acted against a film, exhibition was prohibited pending judicial review, however protracted; and (3) No assurance of prompt judicial determination was afforded."

. . .

The Supreme Court, in *Freedman v. Maryland*, supra *Kingsley Books, Inc. v. Brown*, 354 US 436 (1957), and *Teitel Film Corp. v.Cuasck*, 390 US 139 (1968), required that any judicial review afforded by the state court in licensing or censorship cases be prompt. No assurance was given to this court that such a prompt decision would be given as required.

. . .

"The due process protections required in any 'penal' statutory scheme are especially important where rights protected by the First Amendment are involved. This was evidenced again in Interstate Circuit v. Dallas, 390 US 676 (1968). There the Supreme Court enunciated the well established principle that the absence, in a licensing statute, of

narrowly-drawn, reasonable and definite standards for officials to follow is constitutionally fatal.

See also *Sokolic, dba Coastal Book Mart, Inc. v. Ryan*, 304 F. Supp. 213, (S.D. Ga., Civ. No. 2501, dec'd. September 19, 1969)."

. . .

"This license revocation required the plaintiff to face at least two practical alternatives: (1) Continue business as usual with revoked license and risk being charged with the Section 14 violations; or (2) Discontinue business and lose its entire income. To require plaintiff to face these alternatives as a result of official action based upon an interaction between Section 102 of the Charter and Section 14 of the Ordinances constitutes a violation of the plaintiff's rights under the First and Fourteenth Amendments of the Constitution. The Supreme Court has said that the plaintiff, faced with an unconstitutional licensing law, was entitled to ignore it and continue in business. See *Shuttlesworth v. Birmingham*, 394 US 147 (1969)

In the case styled *Mike Sokolic, d/b/a Coastal Book Mart v. Leo B. Ryan, et al.*, reported at 304 F. Supp. 213 (1969) the Court stated:

"I find that although the ordinance may have been unconstitutionally applied in the present situation it has a constitutionally permissible purpose and is not facially invalid.

"(8) The ordinance was used to close a business which is within the protection of the First Amendment. That in the closing of it plaintiff's right to sell reading and visual materials was violated is undisputable in the light of Quantity of Copies of Books v. Kansas, supra. It would seem to be an anomaly if the courts were to protect freedom of expression from police encroachment by demanding compliance with due process and allow total suppression of such rights by authorities under municipal procedures inconsistent with those applicable to criminal procedures. Was plaintiff adequately protected by the municipality license revocation procedures?

"(9) The license was seized on July 16; the store padlocked on the 17th without any hearing. On July 25 one was conducted before the Mayor and Aldermen. Plaintiff was notified. Assuming for the purpose of argument the power of City Council to conduct the adversary hearing required by the First Amendment, was such a hearing ever held; Recent cases cited above make it clear that suppression of the dissemination of literature can occur only when one sells or offers for sale materials that have been previously declared obscene in an adversary proceeding. In the present case the adversary proceeding, if such it was, was conducted after, not before, the suppression. It could not validate the padlocking even if the materials were found by the Council to be obscene."

In a recent opinion dated January 14, 1970, out of the United States District Court for the District of Massachusetts, in a case entitled *Broadway Distributors, Inc., et al. v.*

Honorable Kevin White, et al., 307 F. Supp. 1180, the court therein stated:

> "The ordinance requires an applicant for registration to identify in his application all persons having a financial interest in his business and also all his suppliers of printed matter and motion picture films. This imposes a requirement of disclosure which is not imposed on businesses generally in Massachusetts. Moreover, it clearly constitutes a requirement which has a substantial deterrent effect on the free exercise of First Amendment rights which cannot be justified without a substantial showing of the necessity for such restriction. *Talley v. California*, 362 US 60; *Bates v. City of Little Rock*, 361 US 516; *N.A.A.C.P. v. Alabama*, 357 US 449."
>
> . . .
>
> "The City undoubtedly has a legitimate interest in protecting minors from literature harmful to them. But it can do so only by legislation 'reasonably restricted to the evil with which it is said to deal.' *Butler v. Michigan*, 352 US 380, 383. The present ordinance is not such legislation. It is not aimed directly at the real evil. It seeks to accomplish its end by the imposition of restrictions which are of doubtful utility for the accomplishment of its purported purpose, and which in any event seek to impose on plaintiffs a prior restraint on their conduct of their businesses so far as they are constitutionally protected. It seeks not only to deter plaintiffs from acts which the state statutes can constitutionally forbid, but also from activity which the First Amendment protects. *Bantam Books, Inc. v. Sullivan*, 372 US 58.

> "The conclusion must be that the ordinance on its face and in all parts is invalid as a prior restraint on the rights of the plaintiffs under the First Amendment as made applicable by the Fourteenth Amendment."

Other cases holding local and state statutes and ordinances invalid for lack of adequate procedural safeguards are numerous. Here are some of the cases not generally cited; *People v. Bunis*, 210 NY 2d 505; *Gannett Co. v. City of Rochester*, 330 NYS 2d 648; *Mature Enterprises v. Bess Myerson*, 72 CIV 5499, decided 12/28/72 (SDNY); *414 Theaters v. Murphy*, CA2 (1973); *Avon 42nd St. Corp. v. Myerson*, 352 F. Supp. 994; *Marks v. City of Newport, Ky.*, 344 F. Supp. 675; *Gall v. Lawler*, 322 F. Supp. 1223; *Griffin v. Mauney*, 346 F. Supp. 545; *Plematis v. City of Daytona Beach*, 340 F. Supp. 617; *Dillon v. Municipal Court*, CAL, 484 P2d 945; *Perrine v. Municipal Court*, 488 P2d 648; *Seattle v. Bittner*, 505 P2d 126; and numerous others.

Maryland, on the other hand consistently, and the District Court for Maryland apparently has held that Maryland or Baltimore City need not have these mandated procedural safeguards in placing a prior restraint upon expression under the *First Amendment*. See *Freedman v. Maryland*, 380 US 51; *Niomotko v. Maryland*, 340 US 268; *Carroll v. President and Commissioner of Princess Anne, Maryland*, 21 Led 2d 325; *Department of Housing and Community Development v. Ellwest Stereo Theaters*, supra; and *Mayor and City Council v. Charles Book Center and Block News, Inc.*, Circuit Court of Baltimore City, case A-5 1572 – (2) on this Ordinance against other projectors where the license was summarily revoked but returned after the *Ellwest* decision.

III.

ARTICLE 15, SECTION 71 IS AN IMPERMISSIBLE TAX UPON FREEDOM OF EXPRESSION GUARANTEED BY VIRTUE OF THE FIRST AND FOURTEENTH AMENDMENTS.

The City of Baltimore has enacted ordinances for the regulation and licensing of numerous business operations within the city. Several of these are codified under *Article 15* and *Article 32* of the *Baltimore City Code*.

The Petitioners are required to obtain a permit for the premises and a permit for each motion picture projector at a permit fee of $100.00 per machine per year under *Article 32, § 149*. The Ordinance requires certain specifications for lighting, exits, aisles and other safety features.

The Petitioners have acquired these required permits.

However, under *Article 15, § 71* "Licenses", another license is required for each motion picture projector at the rate of $150.00 per year. This license ordinance only, Petitioners are claiming is invalid and unconstitutional.

The District Court found that the Petitioners had not shown the license fee was invalid and burdensome. Yet the court overlooked the principles enunciated by this court in its decisions over many years. First a prior license of this type bears a heavy presumption against its validity and that only reasonable licensing fees that are necessary to defray the cost of administration are permissible. The District Court overlooked these considerations.

In *Article 15* under § *71 (a) (1)* there is provided a license fee of $150.00 for each and every coin-operated amusement device.

The sum of $150.00 per machine became effective January 1, 1971, increasing the licensing fee from the sum of $110.00 per machine, per year.

Since the Petitioners have ten machines in one premises and nine machines in another premises this requires annual licensing in the amount of $1,500.00 and $1,350.00 respectively. The city, although commencing enforcement in March of 1972 directed payment and licensing for 1971 and 1972 or $3,000.00 and $2,700.00 respectively.

These machines are operated by the insertion of a quarter into the coin slot in order to view the motion picture film.

This means each machine must receive 600 such quarters merely to pay for the license under this Ordinance, not considering the other permit for $100.00. It does not take a genius to figure out that this amount of licensing is not only prohibitive but must be considered a bar to the dissemination of motion pictures as a medium of expression.

In this introduction several salient points must be kept in mind;

1. The power to tax expression is the power to tax unwanted expression to such a point that it cannot survive, and

2. That the city authorities did not attempt to impose such a tax upon these motion picture machines until their efforts at regulating them under building theater codes were found invalid, and

3. That this licensing tax is not placed upon all motion picture machines but only those in a certain type of establishment, and

4. That this license is not a general business license which is generally the only valid license upon expression, and

5. That this licensing ordinance was upon the books for many years and not enforced against these instruments, and

6. That the cost of these licenses are not claimed to be necessary for compensation for regulation expenses but is admittedly a money making proposition for the City only. Therefore if it is valid then the amount can be raised to any point desired i.e. $5,000.00 per machine. The actual regulation for safety is under the Article 32 license the Petitioners obtained.

7. That the city authorities have total authority to grant or deny these licenses and may revoke or suspend them in their discretion without guidelines.

8. That taxing motion picture machines is no different than taxing printing presses or motion picture cameras or book stores and newsstands.

9. The burden of proof and duty to institute Court action lies with the Petitioners if a license is refused or revoked.

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The power to levy a tax of $150.00 includes the power to levy a tax of $500.00 or $5,000.00. Such a power includes the power to control the ultimate use or none-use of these machines.

A license fee levied against a machine of this nature is a fee on the exercise of a *First Amendment* right. The cases striking down license fees for the exercise of *First Amendment* freedoms as being unconstitutional, are numerous. A very recent one being *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir, 1972) wherein a Cambridge, Massachusetts ordinance requiring a permit to sell newspapers was struck down. A similar case was *Strasser v. Doorley*, 309 F. Supp. 716 (D.R.I. 1970).

The Supreme Court in *Grosjean v. American Press Co.*, 297 US at 245 et seq. set forth an excellent historical account of English and American Colonial newspaper taxation statutes which led up to the *First Amendment*. Some of this history was set forth as follows:

> "In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. 1, pp. 8-10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322-327. There followed more than a century of resistance to and evasion of, the taxes, and of agitation for their repeal.

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"That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question

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even on the part of * those who defended the act. May (Constitutional History of England, 7th ed., vol. 2, p. 245), after discussing the control by "previous censuree," says: " . . . a new restraint was devised in the form of a stamp duty on newspapers and advertisements, – avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time."

. . .

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved.

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In the ultimate, an informed and enlightened public opinion was the thing at stake.

. . .

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136, 137.

The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888 p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words "freedom of the press" the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief

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must be rejected in the face of the then well known purpose of the exactions and the general adverse sentiment of the colonies in respect of them.

. . .

In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications or their circulation, including that which had theretofore been effected by these two well known and odious methods.

. . .

Judge Cooley has laid down the test to be applied – "The evils to be prevented were not the censorship of the press merely, but any action of the

* [250]

government by * means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, Const. Lim 8th ed. p. 886.

While the discussion is concerned mainly with taxes on newspapers and pamphlets it is equally applicable to any other tax on any other form of protected expression. There is a striking similarity between the actions of the English ruling classes in their attempts to snuff out the free dissemination of information and the activities, albeit well intentioned, of the city administration in attempting by whatever means to impose their standards of morality on the populace. Good intentions are not enough to compensate for the unconstitutionality of the course of action they have chosen to follow.

It must be presumed that these machines contain protected *First Amendment* materials because the wording of the ordinance applies to all machines no matter what their content and there has been no suggestion that they contain otherwise. The machines might contain Mickey Mouse cartoons, reruns of particularly important news films, or copies of the old Movietone news films that used to be shown in the theatres or they may contain hard core pornography. It doesn't matter, the licensing statute hits them all equally.

It is obvious from the events leading up to this attempt to collect amusement device licensing fees from the owners of these machines that this is another attempt by the local officials to circumvent the mandates of the United States Constitution and the pronouncements of the Supreme Court prohibiting prior censorship. We now have for the first time an allegation that these coin operated viewing machines are subject to the city amusement devises licensing.

The Supreme Court of the United States in *Bantam Books v. Sullivan*, 372 US 58, 65, 9 L. Ed. 2d 584, 590, 83 S. Ct. 631 (1963) stated,

"It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech. *Marcus v. Search Warrant of Property*, 367 US 717, 730, 731, 6 L Ed. 2d 1127, 1135, 1136, 81 S. Ct. 1708.

CONCLUSION

The United States Court of Appeals for the Fourth Circuit in its Three-Judge Per Curium Opinion affirmed the judgment of the District Court for the reasons stated by the District Court. However, the opinion of the District Court implies that the statutory language of the ordinance was rejected together with the officials' construction of the ordinance as well as the claimed powers of the administrative officials for their sole discretion to grant, refuse, suspend or revoke licenses under this ordinance. The District Court further rejected the construction of this ordinance by the city officials in their enforcement activities of it where they conceded they had the power to summarily revoke without hearing these licenses and had previously done so on other occasions against motion picture projectors in the city of Baltimore.

The Maryland District Court which rejected the language of the statute and the construction and activities of the licensing authorities had held that the city had not sustained its burden of proof of such construction by any written opinion or appellate decision. Since the burden of proof was met by the Petitioners herein by the admissions of the administrative officials it was not the District Court's right to

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require an admission by a defendant to be supported by them by case law.

The ordinance contains no guidelines or standards to guide the licensing authorities in their unfettered discretion and requires no hearing or judicial review or burden of proof upon the administrative officials. The District Court conceded this but held that such standards and guidelines in licensing the exercise of expression under the First Amendment by motion pictures is not necessary if he were to construe the ordinance as only requiring such revocation and denial for non-payment. This construction is not only contrary to all applicable decisions of this court and numerous other state and federal courts but also by the administrative officials themselves who administer its provisions and is in error.The Court granted judgment for the Defendants.

The Petitioners therefore respectfully urge this Honorable Court to grant the Writ of Certiorari as requested herein and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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(301) - 821-6868

Attorney for Petitioners

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AL STAR as Manager and President of FAYETTE NEWS CENTER, INC., and GAYETY BOOKS, INC.

v.

CHARLES L. BENTON, in his capacity as Director of Finance of the City of Baltimore, the Honorable WILLIAM DONALD SCHAEFER, in his capacity as Mayor of the City of Baltimore, the Honorable GEORGE L. RUSSELL, JR., in his capacity as City Solicitor for the City of Baltimore, JOHN A. LUETKEMEYER, JR., in his capacity as Treasurer of the City of Baltimore, the Honorable MARVIN MANDEL, Governor of the State of Maryland, and the Honorable FRANCIS B. BURCH, Attorney General for the State of Maryland.

CIVIL NO. 72-607-Y

MEMORANDUM AND ORDER

Plaintiff, Al Star, challenges the constitutionality of Article 15 of the Baltimore City Code, further alleging a conspiracy by defendants to interfere with the exercise of his First Amendment rights in violation of 42 U.S.C. §§ 1983 and 1985 and the First Amendment. Seeking declaratory and injunctive relief against the enforcement of Baltimore City

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Code, art. 15, § 71 (1966)[1] as well as money damages, plaintiff invokes jurisdiction under 28 U.S.C. §§ 1331, 1343(3)-(4) and 2201. Having considered the evidence presented and arguments made on behalf of the parties, this court enters the following:

FINDINGS OF FACT

Plaintiff is president and manager of Fayette News Center, Inc., and Gayety Books, Inc., adult book stores with a number of individual viewing booths on the premises that are equipped with coin-operated movie machines; there are fourteen at Gayety and nine at Fayette.

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[1]. The text of Baltimore City Code, Art. 15, § 71 (1966):

71. Licenses.

(a) *Required; fees.* Every person, firm, association or corporation owning, or operating, or placing, or keeping, or permitting to be kept, or maintaining for use, or permitting the use of, any of the hereinafter described amusement devices for public entertainment or amusement, in any place or on any premises in the City of Baltimore shall obtain an annual license from the City Treasurer and shall pay therefor the annual license fee hereinafter set forth, before any such amusement device is placed in use or operation for any of the purposes hereinbefore mentioned:

(1) One Hundred Fifty dollars ($150.00) for each and every coin-operated amusement device, except such devices covered by subparagraph (2) hereof. For the purposes of this subparagraph (1), the term "coin-operated amusement device" includes, but is not limited to, the following devices, if the same are operated or activated by coins or tokens: claw machines, bowling machines, shuffle board machines, pinball machines, pool tables, console machines, target machines, baseball machines, and other similar devices; provided, however, that such term does not include bona fide vending machines in which amusement features are not incorporated or made a part thereof;

* * *

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Defendants, Charles L. Benton, Director of Finance; George L. Russell, Jr., City Solicitor; John A. Luetkemeyer, Treasurer; William Donald Schaefer, Mayor, are all officials of the City of Baltimore. Defendants Marvin Mandel and Francis B. Burch are Governor and Attorney General, respectively, for the State of Maryland. As to the last two defendants, there were neither allegations nor evidence presented to connect them with this case.

Through a series of letters from officials of the Department of Finance (the first letter dated March 9, 1972), plaintiff was notified that each of his machines required payment of an annual license fee of $150.00 under § 71 (a) (1) of Article 15, which licenses "coin-operated amusement devices." It was stated in the letters that failure to pay the required fees promptly would leave plaintiff open to criminal prosecution, making him subject to arrest for a misdemeanor and liable for a fine of one hundred dollars for each offense.

The decision to tax these machines under section 71 followed the decision in *Dept. of Housing and Community Development v. Ellwest Stereo Theaters, Inc.*, 263 Md. 678, 284 A.2d 406 (Dec. 13, 1971). The Court of Appeals of Maryland held that establishments having a number of these coin-operated movie machines on the premises were not motion picture theaters as the City of Baltimore contended and not subject to motion picture theater regulations. Following the *Ellwest* decision, Benton was advised that he should proceed with the collection of license fees for these coin-operated machines. (PX-1, p. 11)

Plaintiff cites this sequence of events as evidence of selective enforcement and harassment to effect suppression of his activities by attempting to force him out of business. Defendants explain this chain of events as an effort to fit plaintiff's businesses under the appropriate ordinance in recognition of *Ellwest*. The testimony of Benton (PX-1, p. 17)

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substantiates the City's position that the ordinance is enforced uniformly and all those with coin-operated amusement devices in the City must pay the fee. Plaintiff offered no evidence to controvert this except to state that motion picture projectors are not taxed under section 71. From this evidence it is apparent that the application of this ordinance is uniform.

On the question of the prohibitive nature of this tax, the record is silent as to the income from the machines and lacks any data to show that a tax of $150.00 is truly prohibitive; further, he did not allege or show that he is unable to pay the fees. When questioned about other taxation of his businesses, plaintiff answered that he pays for a "trader's license" which was described as a general business license. Mr. Kinnersley stated in his deposition that this trader's license was the only other (other than § 71) tax that he knew of that plaintiff was required to pay, and that this license was issued "by the Court of Common Pleas under the state." (PX-2, p. 20) The evidence is clear that the fees imposed under section 71 are the only City tax imposed on the plaintiff's businesses.

Attempts by the City to revoke permits granted under section 71 to similar businesses have occurred (PX-1, p.9). These attempts led to the *Ellwest* case where plaintiffs succeeded in enjoining the withdrawal of their arcade permits granted under Article 15, § 71(b). The power to revoke or refuse to license machines under this ordinance is understood by Benton (PX-1, p. 7) to reside in the Director of Finance upon the approval of the Mayor under Article 15, § 22.[2]

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[2]. Section 22. *Refusal, revocation of license.*

Upon the approval of the Mayor, the Treasurer shall have full power and authority to refuse to grant licenses under the provisions of this Article, and also, when directed by the Mayor, shall have full power and authority to revoke any license granted by virtue of this Article. [Subsequent amendment changed "Treasurer" to "Director of Finance."]

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This authority is urged by plaintiff to be arbitrary and overbroad, making the ordinance unconstitutional. However, such an interpretation of section 22 and its relationship to section 71 is not advanced in any judicial decision or administrative opinion relied on by the City.

Establishments having fifteen or more coin-operated devices, licensed under Article 15, § 71 (a) (1), qualify for licensure as an amusement arcade under Article 15, § 71(b), and must pay an annual fee of $1200.00.[3].

No evidence was presented of any rules or regulations promulgated under section 71(g) for enforcement and collection of fees.[4]

There was no showing of "bad faith" enforcement of these ordinances or a conspiracy to suppress plaintiff's activities.

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[3]. Section 71(b) *Amusement arcades.*

Provided, that for any premises operated within the City of Baltimore licensed as an amusement arcade, having fifteen (15) or more claw machines, bowling machines, shuffle board machines, pinball machines, pool tables, console machines, target machines, baseball machines, and other similar devices operated or activated by coin or token, the total sum due and payable for a license under this subtitle to operate all of said devices shall be twelve hundred dollars ($1,200.00) per annum.

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[4]. Section 71(g) *Rules and Regulations.*

In order to properly carry out and enforce the provisions of this section and to collect the license fees levied and imposed under this section, the City Treasurer is hereby authorized and

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CONCLUSIONS OF LAW

Plaintiff attacks the constitutionality of this ordinance on a number of grounds: that the ordinance acts as a prior restraint on First Amendment rights, is overly broad and vague, lacks procedural safeguards, gives administrative officials unlimited discretion, is class legislation, and further, that the application of the ordinance has been unconstitutional due to discriminatory enforcement, suppression of First Amendment materials, unequal taxation and harassment by City officials.

Plaintiff's standing to challenge the constitutionality of this ordinance is uncontested by defendants. In the area of freedom of expression, challenges that regulatory ordinances confer overly broad discretion to licensing officials are favored, and

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. "One who might have had a license for the asking may * * * call into question the whole scheme of licensing when he is prosecuted for failure to produce it."

Freedman v. Maryland, 380 U.S. 51, 56 (1965).

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[4] (Continued)

empowered to make, adopt, promulgate and amend, from time to time, such rules and regulations as he may deem necessary or proper to carry out and enforce the provisions of this section and to fully collect the license fees imposed under this section, and to define or construe any of the terms and provisions used in this section.

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Although Star has not been prosecuted for failure to obtain the required licenses, he has been threatened with prosecution; further, revocation of licenses under this ordinance have occurred and the power to refuse or revoke these licenses may have a "chilling effect" on plaintiff's exercise of freedom of expression. The potency of such threats to freedom of expression has been recognized in *United Steelworkers (AFL-CIO v. Bagwell,* 383 F.2d 492 (4th Cir. 1967), where a union organizer was found to have standing to challenge the constitutionality of an anti-littering ordinance that was held out as requiring a permit for his union activities even though he had never applied for such a permit, or been denied one, and had never been prosecuted for failure to obtain a permit. However, he had been threatened with prosecution under the ordinance and such a threat in the area of First Amendment rights was held to be inhibitory of free exercise, giving him standing to challenge the licensing provisions.

Films shown in these coin-operated machines are protected under the First Amendment as motion picture films, "* * * expression by means of motion pictures is included within the free speech and free press guarantee of the First and Fourteenth Amendments." *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 502 (1952). It would seem anomalous to distinguish between motion pictures shown in motion picture theaters and those shown in coin-operated machines as far as the breadth of the First Amendment is concerned, and we do not. Other courts considering this question have refused to make the distinction. *414 Theater Corp. v. Murphy, et al.,* 73 Civil No. 22, Memorandum Opinion No. 39641 (S.D.N.Y., filed June 29, 1973); *Soof v. City of Highland Park,* 30 Mich. App. 400, 186 N.W. 361 (1971).

Plaintiff argues that the taxation imposed by section 71(a)(1) is invalid since it taxes freedoms guaranteed by the First Amendment. Certainly taxation as well as any regulation in the First Amendment area meets stiff judicial scrutiny; however, commercial enterprises dealing in First Amendment

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materials or exercising First Amendment rights are not immune from reasonable taxation. *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1935) (newspapers); *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966) (movie theater); *City of Corona v. Corona Daily Independent*, 115 Cal. App. 2d 382, 252 P.2d 56, *cert. den.*, 346 U.S. 833 (1952); *Soof, supra* (coin-operated movie machines).

Grosjean held that the destructive effect of the taxation on the breadth of newspaper circulation made the tax impermissible. Similarly in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court found that the tax imposed on those soliciting door-to-door served to restrict freedom of religion of religious colporteurs seeking to distribute literature, thereby spreading their faith. The Court in *Murdock* drew a strong distinction between such ordinances regulating commercial enterprises and those regulating non-commercial enterprises. In *Murdock* it is clear that the effect of the tax on the enterprise–not its form–must be examined to see if the tax restricts free exercise. "It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive effect." 319 U.S. at 113.

Businesses such as plaintiff's are subject to reasonable, non-confiscatory taxation. In view of the absence of any showing of hardship by plaintiff or inability to pay the tax and the evidence that proprietors with such machines uniformly pay this tax, the tax is neither unreasonable nor discriminatory.

Plaintiff questions the legitimacy of purpose in the taxation, suggesting that the tax must be limited to an amount calculated to defray the administration of licensing and related activities. The City contends that it has broad authority to tax businesses within its jurisdiction, citing *McBriety v. Baltimore*, 219 Md. 223, 148 A.2d 408 (1958), and admits that this ordinance provides revenue to the City. (PX-1 p.19)

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Certainly businesses engaged in activities protected by the First Amendment are not immune from contribution to the increased costs to the City for upkeep and added services required as a result of business operations, even though they deal in First Amendment materials. As long as the taxation is uniform and reasonable, and non-discriminatory, the City's purpose in seeking additional operating revenue through these licensing ordinances is valid. The court considered this issue in *Soof, supra,* stating at page 364, "The commercial entrepreneur can legitimately be subjected to license regulations which, for example, require a reasonable, non-confiscatory license fee to provide additional revenue to offset increased municipal expenses resulting from the licensee's operation," and in *City of Corona v. Corona Daily Independent, supra,* the court found a non-discriminator tax levied on newspapers as well as other business, for the sole purpose of maintaining the municipal government, was constitutional.

Plaintiff's challenge to the ordinance is based on the alleged overbreadth of discretion granted to licensing officials. He contends that section 22 has been applied to section 71 of Article 15 in the past and can be applied to him in the future, thus having a "chilling effect" on his activities since the discretion is unlimited, without standards, and lacks procedural safeguards. It is clear that any licensing of First Amendment activities requires close examination, and licensing that allows an official to refuse or revoke a required permit must set forth limits to this discretion, standards to judge the objectivity of the licensing process, and procedural safeguards that provide for redress. *Niemotko v. Maryland,* 340 U.S. 268 (1950); *Cox v. New Hampshire,* 312 U.S. 569 (1941).

> It is well settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring

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> a permit or license which may be granted or withheld in the discretion of such official – is unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. Baxley, 355 U.S. 313, 322 (1958).

A literal reading of section 22 would seem to make it applicable to section 71 as well as to the other sections of Article 15; however, the indexing and treatment of the sections make the applicability less certain. Article 15 is a general licensing article with 90 sections. Five other divisions of Article 15 have separate sections providing for revocation or refusal of licenses. Under "Ambulances" (section 5), the Commissioner of Health is enpowered to revoke licenses of ambulance drivers where carelessness is shown. Section 26(o) deals with the suspension of a bail bond license by the Bail Bond Board "for any cause which would be sufficient for denial of the license * * *." Similarly, sections 40, 41 and 45 deal with the authority of the Director of Traffic to refuse, revoke or suspend licenses granted under the provisions of Article 15 that deal with "Drivers Schools." Sections 67 and 86 give the Mayor power to grant or revoke, respectively, a pawnbroker's license if "sufficient cause is shown" and a produce wholesaler's license if it is shown that the licensee is in violation of the applicable licensing provisions.

Section 71 stands independent of other sections of Article 15, having its own separate enforcement provisions that allow the Director of Finance to adopt and promulgate rules and regulations for the collection of fees (71-g) and a separate section dealing with penalties (71-h). By construing section 71 as a section that allows no discretion in granting, refusing or revoking a license, only non-payment of the fee can result in non-licensing and no licensing standards or procedural safeguards are needed. Such an interpretation is not only plausible from the construction of Article 15, but is necessary if section

71 is to stand and follows the "venerable principle" of construing a provision so as to avoid doubtful constitutionality. *United States v. Bradley*, 418 F.2d 688, 691 (4th Cir. 1969).

For the reasons herein set forth, Baltimore City Code, Art. 15 §71(a)(1) is constitutional on its face and as applied to the plaintiff.

It is, therefore, this 26th day of September, 1973,

ORDERED by the United States District Court for the District of Maryland, that judgment be and hereby is entered in favor of the defendants.

/s/ Joseph H.Young.
United States District Judge.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Al Star, as manager and president of Fayette News Center, Inc., and Gayety Books, Inc.

v.

Charles L. Benton, in his capacity as Director of Finance of the City of Baltimore, and the Honorable William Donald Schaefer, in his capacity as Mayor of the City of Baltimore, and the Honorable George L. Russell, Jr., in his capacity as City Solicitor for the city of Baltimore, and John A. Luetkemeyer, Jr. in his capacity as the Treasurer of the City of Baltimore, and the Honorable Marvin Mandel, Governor of the State of Maryland, and the Honorable Francis B. Burch, Attorney General for the State of Maryland.

No. 72-607-Y Civil

JUDGMENT

This action came on for trial before the Court, Honorable Joseph H. Young, United States District Judge presiding and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that Judgment be and hereby is entered in favor of Defendants against Plaintiffs, for costs.

September 27, 1973. Paul R. Schlitz, Clerk

By:

/s/ Edw. A. Heinzerling, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 73-2390

Al Star, as Manager and President of Fayette News Center, Inc., and Gayety Books, Inc.,

Appellants,

versus

Charles L. Benton, in his capacity as Director of Finance of the City of Baltimore, and the Honorable William Donald Schaefer, in his capacity as Mayor of the City of Baltimore, and the Honorable George L. Russell, Jr., in his capacity as City Solicitor for the City of Baltimore and John A. Luetkemeyer, Jr., in his capacity as the Treasurer of the City of Baltimore, and the Honorable Marvin Mandel, Governor of the State of Maryland, and the Honorable Francis B. Burch, Attorney General for the State of Maryland.

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Joseph H. Young, District Judge.

Argued October 7, 1975 Decided Dec. 23, 1975

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and WATKINS, Senior District Judge

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William E. Seekford for Appellant; Richard K. Jacobsen, Assistant City Solicitor, (George L. Russell, Jr., City Solicitor, and Harry Swartzwelder, Jr., Chief Assistant City Solicitor, on brief) for Appellees.

PER CURIAM:

We affirm for the reasons stated by the district court. The City of Baltimore can apply a non-regulatory, non-confiscatory license tax on all coin-operated amusement devices to coin-operated movie machines.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 73-2390

Al Star, as Manager and President
of Fayette News Center, Inc., and
Gayety Books, Inc.,

Appellants,

vs.

Charles L. Benton, in his capacity as
Director of Finance of the City of
Baltimore, and the Honorable William
Donald Schaefer, in his capacity as Mayor
of the City of Baltimore and the Honorable
George L. Russell, Jr., in his capacity as
City Solicitor for the City of Baltimore
and John A. Luetkemeyer, Jr., in his
capacity as the Treasurer of the City of
Baltimore, and the Honorable Marvin
Mandel, Governor of the State of
Maryland and the Honorable Francis B.
Burch, Attorney General for the State
of Maryland.

Appellees.

Appeal from the United States District Court for the District of Maryland.

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS, therefore, ORDERED that the petition for rehearing be, and it is hereby, denied.

For the Court – by direction

/s/William K. Slate, II,
Clerk.

/s/Virginia Lipford
Deputy Clerk.

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A.17

ARTICLE 15 AND AMENDMENTS

LICENSES

Ambulances

1. Operation.
2. Definitions.
3. Licenses.
4. Rules and regulations.
5. Suspension or revocation of licenses.
6. Appeals.
7. Penalty provisions.

Amusements

8. License; fee.
9. Billiards.
10. Pool rooms; hours.
11. Bowling alleys.
12. Same; hours.
13. Burlesque show; minors.
14. Theatres.
15. Minors on premises.
16. Exemption for occupants.
17. Ball with admission fee.
18. Same; fees.
19. Exemption for National Guard.
20. Fee for musical parties.
21. Defacing posters.
22. Refusal, revocation of license.
23. Violations; enforcement.
24. Ticket scalping.

Animated Riding Devices

25. Regulation.

Bail Bonds

26. Regulation.

Dogs

27. General requirements.
28. Fee for removing dead dog or cat.
29. Dog disturbing the peace.
30. License required; exceptions.
31. Dogs serving with armed forces.
32. Kennel license.
33. Hindering enforcement.
34. Seizure of dogs.
35. Release of dogs.
36. Poisonous substances in public place.
37. Misrepresentation to obtain custody.

Drivers' Schools

38. Definitions.
39. Licenses.

Drivers' Schools (Cont)

40. Refusal to issue school license.
41. Refusal to issue instructor's license.
42. Suspension or revocation of license.
43. Hearing.
44. Supervision.
45. Suspension of instruction certificate.
46. Employees.
47. Penalty provisions.

Employment Agencies

48. License required.
49. Exhibition of license.
50. Penalty provisions.

Gypsies

51. License required.
52. Same; penalty provisions.
53. Enforcement.
54. Proof.

Mobile Riding Units

55. Licenses.

Open Air Garages

56. Licenses.

Pawnbrokers

57. Licenses.
58. Definition.
59. Advertising.
60. Hours for operation.
61. Surety bonds.
62. Daily reports.
63. Deposits.
64. Redemption; sale
65. Interest and charges.
66. Action for default.
67. Restrictions on licenses; revocation.
68. Penalty provisions.

Photographs

69. Prohibited in public places.
70. Penalty provisions.

Pinball Machines and Other Devices

71. Licenses.
72. Severability provisions.

Pinball Machines Operated by Minors

73. Unlawful.

LICENSES

Selling in Streets

74. Licenses for poor persons.
75. Sale of fruits.
76. Same; license.
77. Notice of noncompliance.
78. License and market detective.
79. Sale of perishable articles.
80. Same; licenses.
81. Badges.
82. Penalties.
83. Country grower's license.

Wholesale Produce Dealers

84. Application of ordinance.
85. License; required.
86. Same; fee, revocation.
87. Requirements.
88. Penalty provisions.
89. Severability.

When Fees Prorated

90. Provisions.

22. Refusal, revocation of license.

Upon the approval of the Mayor, the Treasurer shall have full power and authority to refuse to grant licenses under the provisions of this Article, and also, when directed by the Mayor, shall have full power and authority to revoke any license granted by virtue of this Article.

23. Violations; enforcement.

Whenever the City Solicitor shall be notified of any violation of the provisions of this Article, it shall be his duty immediately to institute legal proceedings against the offender or offenders, to recover from him, her, or them, the penalty or penalties prescribed by this Article.

Pinball Machines and Other Devices.

City Code, 1950, art. 19, sec. 53. Ord. 746, 1946-47; Ord. 105, 1947-48, sec 1; Ord. 90, 1951-52, sec. 53; Ord. 665, 1956-57; Ord. 699, 1956-57; Ord. 1106, 1957-58; Ord. 1157, 1957-58; Ord. 1494, 1962-63, sec. 53; Ord. 1525, 1962-63, sec. 53 (h)

71. Licenses.

(a) *Required; fees.* Every person, firm, association or corporation owning, or operating, or placing, or keeping, or permitting to be kept, or maintaining for use, or permitting the use of, any of the hereinafter described amusement devices for public entertainment or amusement, in any place or on any premises in the City of Baltimore shall obtain an annual license from the City Treasurer and shall pay therefor the annual license fee hereinafter set forth, before any such amusement device is placed in use or operation for any of the purposes hereinbefore mentioned:

(1) Ninety dollars ($90.00) for each and every coin-operated amusement device, except such devices covered by subparagraph (2) hereof. For the purposes of this subparagraph (1), the term "coin-operated amusement device" includes, but is not limited to, the following devices, if the same are operated or activated by coins or tokens; claw machines, bowling machines, shuffle board machines, pinball machines, pool tables, console machines, target machines, baseball machines, and other similar devices; provided, however, that such term does not include bona fide vending machines in which amusement features are not incorporated or made a part thereof.

(2) Twenty-five dollars ($25.00) for each and every music box, mechanical player piano, graphophone or other similar mechanical musical device played by the insertion of a coin or token, and two dollars ($2.00) for each additional independent coin-operated speaker delivering music on the same premises; and

(3) Thirty-five dollars ($35.00) for each and every shuffle board which is not coin-operated.

(4) In the case of any amusement device specified hereinabove in this subsection, which is first being placed in use or operation and which is being licensed for the first time under this subtitle, a license may be secured for less than a period of one full year. In such case the license fee for three-quarters of the year shall be 75% of that indicated for a full year; the fee for one-half of the year shall be 50% of that indicated for the full year; and the fee for one-quarter of the year shall be 25% of that indicated for the full year. For any such amusement device a license shall be obtained and a fee shall be paid for the number of full and partial quarters remaining in that calendar year.

(b) *Amusement arcades.* Provided, that for any premises operated within the City of Baltimore licenses as an amusement arcade, having fifteen (15) or more claw machines, bowling machines, shuffle board machines, pinball machines, pool tables, console machines, target machines, baseball machines, and other similar devices operated or activated by coin or token, the total sum due and payable for a license under this subtitle to operate all of said devices shall be twelve hundred dollars ($1,200.00) per annum.

(c) *Substituted devices.* If any one device mentioned in subsection (a) hereof is substituted by the same license, for any reason, by another device which is subject to the same license fee as provided herein, then such replacement device shall not be subject to an additional license fee.

(d) *Metal tags.* Each device licensed as required by this section shall have affixed to it at all times a metal tag or other indicia, as prescribed and issued by the City Treasurer, showing that the license fee for such device has been paid, and such metal tag or other indicia shall be securely attached, by the legal entity who is required to secure a license for such device as prescribed by subsection (a) hereof, to the device for which it was issued. Provided, that the provisions of this subsection (d) shall not apply to any duly licensed amusement arcade as set forth in subsection (b) hereof, and in lieu thereof, the City Treasurer shall issue a certificate for any such amusement arcade, and said certificate shall be publicly displayed at all times in a prominent place within such arcade.

(e) *When fees due.* Except as herein provided otherwise, any and all license fees provided for in subsection (a) hereof shall be due and payable in full on the first day of January of each and every year. No refunds, in whole or in part, of any of the license fees provided for in this section shall be made for any reason or under any circumstances.

(1) Ninety dollars ($90.00) for each and every coin-operated amusement device, except such devices covered by subparagraph (2) hereof. For the purposes of this subparagraph (1), the term "coin-operated amusement device" includes, but is not limited to, the following devices, if the same are operated or activated by coins or tokens; claw machines, bowling machines, shuffle board machines, pinball machines, pool tables, console machines, target machines, baseball machines, and other similar devices; provided, however, that such term does not include bona fide vending machines in which amusement features are not incorporated or made a part thereof.

(2) Twenty-five dollars ($25.00) for each and every music box, mechanical player piano, graphophone or other similar mechanical musical device played by the insertion of a coin or token, and two dollars ($2.00) for each additional independent coin-operated speaker delivering music on the same premises; and

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(4) In the case of any amusement device specified hereinabove in this subsection, which is first being placed in use or operation and which is being licensed for the first time under this subtitle, a license may be secured for less than a period of one full year. In such case the license fee for three-quarters of the year shall be 75% of that indicated for a full year; the fee for one-half of the year shall be 50% of that indicated for the full year; and the fee for one-quarter of the year shall be 25% of that indicated for the full year. For any such amusement device a license shall be obtained and a fee shall be paid for the number of full and partial quarters remaining in that calendar year.

(b) *Amusement arcades.* Provided, that for any premises operated within the City of Baltimore licenses as an amusement arcade, having fifteen (15) or more claw machines, bowling machines, shuffle board machines, pinball machines, pool tables, console machines, target machines, baseball machines, and other similar devices operated or activated by coin or token, the total sum due and payable for a license under this subtitle to operate all of said devices shall be twelve hundred dollars ($1,200.00) per annum.

(c) *Substituted devices.* If any one device mentioned in subsection (a) hereof is substituted by the same license, for any reason, by another device which is subject to the same license fee as provided herein, then such replacement device shall not be subject to an additional license fee.

(d) *Metal tags.* Each device licensed as required by this section shall have affixed to it at all times a metal tag or other indicia, as prescribed and issued by the City Treasurer, showing that the license fee for such device has been paid, and such metal tag or other indicia shall be securely attached, by the legal entity who is required to secure a license for such device as prescribed by subsection (a) hereof, to the device for which it was issued. Provided, that the provisions of this subsection (d) shall not apply to any duly licensed amusement arcade as set forth in subsection (b) hereof, and in lieu thereof, the City Treasurer shall issue a certificate for any such amusement arcade, and said certificate shall be publicly displayed at all times in a prominent place within such arcade.

(e) *When fees due.* Except as herein provided otherwise, any and all license fees provided for in subsection (a) hereof shall be due and payable in full on the first day of January of each and every year. No refunds, in whole or in part, of any of the license fees provided for in this section shall be made for any reason or under any circumstances.

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(f) *Licenses transferable.* The licenses provided for in this section may be transferred from one licensee to another upon written application to the City Treasurer and his approval thereof.

(g) *Rules and regulations.* In order to properly carry out and enforce the provisions of this section and to collect the license fees levied and imposed under this section, the City Treasurer is hereby authorized and empowered to make, adopt, promulgate and amend, from time to time, such rules and regulations as he may deem necessary or proper to carry out and enforce the provisions of this section and to fully collect the license fees imposed under this section, and to define or construe any of the terms and provisions used in this section.

(h) *Penalties.* Any person or other legal entity who shall participate or aid in any manner in the evasion of the payment of the license fees imposed under this section, or who shall violate any of the terms or provisions of this section or any of the rules or regulations made, adopted or promulgated by the City Treasurer under the provisions of this section, shall be deemed guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be subject to a fine of not more than one hundred dollars ($100) for each offense.

City Code, 1950, art. 19, sec. 56. Ord. 105, 1947-48, sec. 4.

72. Severability provisions.

If any part, section, clause, sentence or provision of this subtitle or any application thereof is held invalid for any reason, the remainder of this ordinance and any application thereof shall not be affected thereby, and to this end, the provisions of this subtitle are declared to be severable.

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ORDINANCE

NO. 856

An Ordinance repealing and reordaining with amendments Section 71(a)(1) of Article 15 of the Baltimore City Code (1966 Edition) as said section was last amended by Ordinance 149, approved June 28, 1968, title "Licenses," subtitle "Pinball Machines and Other Devices," increasing the fees for certain licenses.

Section 1. *Be it ordained by the Mayor and City Council of Baltimore,* That Section 71(a)(1) of Article 15 of the Baltimore City Code (1966 Edition) as said section was last amended by Ordinance 149, approved June 28, 1968, title "Licenses," subtitle "Pinball Machines and Other Devices," be and it is hereby repealed and re-ordained with amendments to read as follows:

"71.

(a)(1) [One hundred ten dollars ($110.00)] ONE HUNDRED FIFTY DOLLARS ($150.00) for each and every coin-operated amusement device, except pinball machines and such devices covered by subparagraph (2) hereof. For the purpose of this subparagraph (1), the term "coin-operated amusement device" includes, but is not limited to, the following devices, if the same are operated or activated by coins or tokens: claw machines, bowling machines, shuffle board machines, pool tables, console machines, target machines, baseball machines, and other similar devices; provided, however, that such term does not include bona fide vending machines in which amusement features are not incorporated or made a part thereof;"

SEC. 2. *And be it further ordained.* That this ordinance shall take effect JANUARY 1, 1971.

Approved June 25, 1970

(Signed) Thomas J. D'Alesandro, III
Mayor of Baltimore City.

(signed) William D. Schaefer
President of the City Council of Baltimore.

Presented to His Honor, the Mayor, this 22nd day of June 1970.

By order, LEO M. WELSH, Chief Clerk

EXHIBIT "E"

BILL NO. 186

ORDINANCE NO. 811

An Ordinance to add a new Section 149 to Chapter 14 of Article 32 of the Baltimore City Code (1966 Edition), title "Building Code of Baltimore City," subtitle "Permits," providing for the issuance, revocation and suspension of permits for peep show establishments and for the charging of fees for said permits; providing for hearings for applicants and permittees whose permits have been denied, suspended or revoked; providing for the affixing of said permits to each peep show device. providing for the investigation prior to the issuance of renewal of any peep show establishment permit; and providing certain building and construction requirements for peep show establishments.

WHEREAS, the physical design of Peep Show premises, consisting of one or more individual booths located in close quarters where a fire in one booth might easily spread to other booths or to other portions of the building; and

WHEREAS, such design creates unusual demands upon escape facilities requiring particular regulations respecting lighting conditions, size of aisles, number of exits and wall construction; and

WHEREAS, safety requirements necessitate a limitation the escape therefrom in the event of fire; and upon the number of occupants of such premises to insure

WHEREAS, the operation of Peep Show Devices necessitate the use of complicated electrical circuitry and projection equipment which is often unattended or not operated by experienced persons, thereby creating a constant fire hazard and consequent peril to the life, limb and safety of persons in or about the premises; and

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WHEREAS, it is the purpose and intent of the Mayor and City Council of Baltimore that the operation of "Peep Show" establishments, as herein defined, should be regulated for the protection of the public from the perils of fire, hazards to health and safety and for the preservation of the peace of the community; now, therefore,

SECTION 1. *Be it ordained by the Mayor and City Council of Baltimore,* That a new Section 149 be and the same is hereby added to Chapter 13 of Article 32 of the Baltimore City Code (1966 Edition), title "Building Code of Baltimore City," subtitle "Permits," said new section to follow immediately after Section 148, thereof, and to read as follows:

149-PEEP SHOW ESTABLISHMENTS.

1490. *Definitions.*

(a) Peep Show Establishment – shall mean a building or any part thereof containing one or more peep show devices.

(b) Peep Show Device – shall mean any device operated for commercial purposes, wherein motion picture or slide films are projected or viewed upon a screen or through a viewer, or in which viewed images are exhibited by means of the projection of internal electronic reflection of motion picture film or slides, but nothing herein is intended to apply to "theatres" as defined in Chapter 20 of this Article 32, nor to the viewing of television which reflects externally transmitted images.

1491. *Permit.*

(a) No person shall operate a peep show establishment without first obtaining a permit for the operation thereof from the Commissioner of Housing and Community Development and without first being in conformity with the provisions of this Section.

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(b) No permit for a peep show establishment shall be issued for a period in excess of one year, and any such permit shall expire on the 31st day of December of each year.

(c) Every person operating a peep show establishment shall pay an annual fee of One Hundred Dollars ($100.00) for each peep show device. Nothing herein contained, however, shall be construed to waive, modify or repeal any fees otherwise chargeable by the City under the provisions of Article 15 of the Baltimore City Code (1966 Edition) (Licenses), it being intended that the fees herein charged are based upon the estimated cost of inspections and issuance of permits.

(d) No refunds shall be made to those discontinuing operation or who sell, give away, or otherwise dispose of a peep show establishment to another person.

1492. *Application for Permit.*

(a) Every applicant for a permit shall file an application therefor with the Commissioner of Housing and Community Development who shall then cause an investigation of the application to determine that:

(1) The applicant did not knowingly make a material misstatement in the application for a permit or for a renewal of a permit; and

(2) The operation pursuant to the issuance or renewal of a permit will be in compliance with the building, fire, electrical, plumbing and health requirements as set forth in this Code or other ordinance and regulations of the Mayor and City Council of Baltimore; and

(3) The operation pursuant to the issuance of a permit will be in compliance with all applicable laws.

1493. *Issuance or Denial of Permit.*

If, upon investigation, the Commissioner or his delegate finds that the operation pursuant to the issuance or renewal of a permit will be in compliance with the requirements set forth in Paragraph 1492, above, the permit shall be granted or renewed. Any application for a permit or for the renewal of a permit may be denied if, after the applicant has been given the opportunity for a hearing as herein described, the Commissioner finds that the operation pursuant to the issuance or renewal of a permit will not be in compliance with the requirements of this Section. The Commissioner shall notify the applicant of his reasons for denial in writing.

1494. *Revocation of Suspension of Permit.*

Any permit issued hereunder may be suspended or revoked if, after the permittee has been given the opportunity for a hearing as herein prescribed, the Commissioner shall find that:

(a) The permittee knowingly made a material misstatement on the application for the permit or for the renewal of a permit, or

(b) The premises are in violation of any one of the requirements as set forth in this Code, or other ordinance or regulations of the Mayor and City Council of Baltimore, relating to the building, fire, electrical, plumbing or health standards, or

(c) The operation pursuant to the permit will not be in compliance with all applicable laws.

In the event that a permit is suspended or revoked, the notification of suspension or revocation as well as the reasons therefor, shall be set forth in writing and mailed to the permittee at the address set fortn on the application for a permit.

No person who has had a permit revoked may obtain a peep show permit within a period of twelve (12) months from the date of revocation.

1495. *Hearing.*

In the event that the Commissioner has evidence that any of the requirements set forth herein have not been complied with, he shall set forth in writing and mail a notice to the applicant or permittee, at the address set forth on the application for a permit, that within a period of not less than five (5) days from the date of the posting of said notice, a hearing shall be conducted to determine the existence of any facts which constitute grounds for the denial of a permit or permit renewal, the suspension of a permit, or the revocation of a permit. The notification shall include the date, time and place of the hearing. The hearing shall be conducted by the Commissioner or his designated agent. The applicant or permittee may have the assistance of counsel or may appear by counsel and shall have the right to present evidence. In the event that the applicant or permittee, or counsel representing the applicant or permittee, fails to appear at the hearing, the evidence of the existence of facts which constitute grounds for the denial of a permit or permit renewal, the suspension of a permit or the revocation of a permit, shall be considered unrebutted.

1496. *Permit Affixed to Device.*

No person shall operate a peep show establishment unless every peep show device contained therein is plainly marked with a serial number and shall have attached thereto a distinguishing tag, sign, permit or other marker issued by the Commissioner of Housing and Community Development. Such permit shall be affixed in a conspicuous location on each device and shall remain affixed thereto until a new or different permit has been issued therefor. No permit shall be transferrable from one person to another or from one device to another.

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1497. *Building and Construction Requirements.*

(a) No person shall operate a peep show establishment unless any wall or partition which is situated so as to create a room, enclosure or booth in which any peep show device is located is constructed of not less than one hour fire-resistive material.

(A) NO PERSON SHALL OPERATE A PEEP SHOW UNLESS EACH BOOTH IN WHICH A PEEP SHOW DEVICE IS LOCATED IS ADEQUATELY CONSTRUCTED OF NOT LESS THAN ONE HOUR FIRE-RESISTIVE MATERIAL, OR OF SUCH OTHER MATERIALS AS MAY BE APPROVED BY THE FIRE DEPARTMENT.

(b) No person shall operate a peep show establishment in which the width of the aisles of any room where a peep show device is located is less than forty-two (42) THIRTY-SIX (36) inches.

(c) No person shall operate a peep show establishment unless there are no fewer than two doorways of a width no less than thirty-six (36) inches which provide ingress or egress from any room in which a peep show device is located, provided, however, that one (1) doorway shall be sufficient in the event this exit meets all of the requirements of the Building Code, and other ordinances and regulations of the Mayor and City Council of Baltimore, for one exit. Doorway or doorways shall be unlocked during business hours.

(d) No person shall operate a peep show establishment unless every doorway which provides egress from any room in which a peep show device is located is provided with an internally illuminated exit sign meeting the requirements of Paragraph 7891 of Article 32 of the Baltimore City Code (1966 Edition).

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No person who has had a permit revoked may obtain a peep show permit within a period of twelve (12) months from the date of revocation.

1495. *Hearing.*

In the event that the Commissioner has evidence that any of the requirements set forth herein have not been complied with, he shall set forth in writing and mail a notice to the applicant or permittee, at the address set forth on the application for a permit, that within a period of not less than five (5) days from the date of the posting of said notice, a hearing shall be conducted to determine the existence of any facts which constitute grounds for the denial of a permit or permit renewal, the suspension of a permit, or the revocation of a permit. The notification shall include the date, time and place of the hearing. The hearing shall be conducted by the Commissioner or his designated agent. The applicant or permittee may have the assistance of counsel or may appear by counsel and shall have the right to present evidence. In the event that the applicant or permittee, or counsel representing the applicant or permittee, fails to appear at the hearing, the evidence of the existence of facts which constitute grounds for the denial of a permit or permit renewal, the suspension of a permit or the revocation of a permit, shall be considered unrebutted.

1496. *Permit Affixed to Device.*

No person shall operate a peep show establishment unless every peep show device contained therein is plainly marked with a serial number and shall have attached thereto a distinguishing tag, sign, permit or other marker issued by the Commissioner of Housing and Community Development. Such permit shall be affixed in a conspicuous location on each device and shall remain affixed thereto until a new or different permit has been issued therefor. No permit shall be transferrable from one person to another or from one device to another.

1497. *Building and Construction Requirements.*

(a) No person shall operate a peep show establishment unless any wall or partition which is situated so as to create a room, enclosure or booth in which any peep show device is located is constructed of not less than one hour fire-resistive material.

(A) NO PERSON SHALL OPERATE A PEEP SHOW UNLESS EACH BOOTH IN WHICH A PEEP SHOW DEVICE IS LOCATED IS ADEQUATELY CONSTRUCTED OF NOT LESS THAN ONE HOUR FIRE-RESISTIVE MATERIAL, OR OF SUCH OTHER MATERIALS AS MAY BE APPROVED BY THE FIRE DEPARTMENT.

(b) No person shall operate a peep show establishment in which the width of the aisles of any room where a peep show device is located is less than forty-two (42) THIRTY-SIX (36) inches.

(c) No person shall operate a peep show establishment unless there are no fewer than two doorways of a width no less than thirty-six (36) inches which provide ingress or egress from any room in which a peep show device is located, provided, however, that one (1) doorway shall be sufficient in the event this exit meets all of the requirements of the Building Code, and other ordinances and regulations of the Mayor and City Council of Baltimore, for one exit. Doorway or doorways shall be unlocked during business hours.

(d) No person shall operate a peep show establishment unless every doorway which provides egress from any room in which a peep show device is located is provided with an internally illuminated exit sign meeting the requirements of Paragraph 7891 of Article 32 of the Baltimore City Code (1966 Edition).

(e) No person shall operate a peep show establishment unless each peep show device located in such establishment is situated so as to permit the person using the peep show device to have a constantly unobstructed view of the doorway or doorways which provide ingress to or egress from the establishment.

(f) (E) No person shall operate a peep show establishment unless a light level of no less than ten (10) foot candles at floor level SUFFICIENT TO INSURE A CLEAR VISIBILITY AND TO PERMIT PATRONS TO READ A MENU OR NEWSPAPER is maintained every portion of said establishment to which the public is admitted.

(g) (F) No person shall operate a peep show establishment unless each booth in which a peep show device is located contains at least thirty (30) TWENTY-FOUR (24) square feet. The viewing area shall be of such size and arrangement that not more than one person will be able to use the device at any one time.

(h) (G) No person shall operate a peep show establishment in which the number of peep show devices exceeds the maximum occupancy load permitted in any room or partitioned portion of a room in which a peep show device is located. The maximum number of peep show devices permitted in any room in a peep show establishment shall be conspicuously posted by the operator and shall remain posted at the entrance to said room.

SEC. 2. *And be it further ordained,* That this ordinance shall take effect thirty (30) days from the date of its passage.

EXPLANATION:

Italics indicate new matter added to existing law.
[Brackets] indicate matter stricken from existing law.
CAPITALS indicate amendments to bill.
Strike out indicates matter stricken out of bill.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1275

AL STAR, AS MANAGER & PRESIDENT OF FAYETTE NEWS CENTER AND GAYETY BOOKS,

Petitioners,

v.

CHARLES L. BENTON, INDIVIDUALLY AND AS DIRECTOR OF FINANCE, CITY OF BALTIMORE; WILLIAM DONALD SCHAEFER, INDIVIDUALLY AND AS MAYOR OF THE CITY OF BALTIMORE; GEORGE L. RUSSELL, JR., SOLICITOR FOR THE CITY OF BALTIMORE; AND JOHN A. LUETKEMEYER, JR., TREASURER OF THE CITY OF BALTIMORE,

Respondents.

RESPONDENTS' BRIEF

ARGUMENT

I.

The Petitioners argue that the imposition of the licensing fee is a prior restraint on their freedom of expression. This is incorrect. Commercial enterprises dealing in First Amendment materials or exercising First Amendment rights are not immune from reasonable taxation, *Grosjean v. Am. Press Co.*, 297 U.S. 233

(1935) (newspapers); *Chemline, Inc. v. City of Grand Prairie,* 364 F.2d 721 (5th Cir. 1966) (movie theatre); *City of Corona v. Corona Daily Independent,* 115 Cal. App. 2d 382, 252 P.2d 56, *cert. den,* 346 U.S. 833 (1952); *Soof v. City of Highland Park,* 30 Mich. App. 400, 196 N.W. 361 (1971) (coin-operated movie machines). The cases cited by the Petitioners on this point are those in which the Court felt compelled to strike a balance between the welfare of the public and the rights of the exhibitor guaranteed by the First Amendment of the Constitution. All of the cases are ones in which the city or township made a conscious effort to curtail a specific activity, i.e., door-to-door canvassing, the distribution of pamphlets, conducting a parade or rally and where legitimate standards for controlling such activities were lacking. In this case Judge Young in the District Court found as a fact that the licensing fee was being imposed by Baltimore City in a uniform non-discriminatory manner on all coin operated amusement devices to defray the cost of policing those establishments utilizing such machines (A. 8).

In their Brief the Petitioners have attempted to distinguish the facts in this case from those in *Cox v. New Hampshire,* 312 U.S. 569 in which this Court held that the licensing fee was proper because the authorities were not invested with any arbitrary discretion to issue or refuse licenses. The Petitioners argue that such is not the case here, yet the uncontradicted evidence is that the license on the coin operated machines, including the "peep show" devices can only be revoked if the exhibitor fails to pay the tax. This is the sole reason which would justify revocation. The City admitted this in its presentation to the District Court and the Court assumed this in its opinion, (A. 10).

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II.

The Petitioners argue that the Director of Finance has full power to refuse the grant of licenses and that no standards or guidelines are set forth in Section 71, Article 15, Baltimore City Code. None are needed for the reasons previously stated. There was testimony that licenses such as these had been revoked by the City from time to time but there was nothing to suggest that said licenses were revoked for any reason but the non-payment of the licensing fee. If there was any evidence to the contrary available it was the Petitioners' burden to prove this, *Lewis v. M. & C.C. of Cumberland,* 189 Md. 58, 54 A.2d 319; *VET. Taxi Ass'n. v. Yellow Cab Co.,* 192 Md. 551, 65 A.2d 173; *Tar Products Corp. v. Tax Comm'n.,* 176 Md. 290, 297, 4 A.2d 462. The Petitioners cite *Soof, supra* as the cornerstone of their argument. There wide discretion was given to the authorities to revoke the license on coin operated machines for any reason and therefore the case is clearly distinguishable from the case at bar. The Petitioners say that there is a similarity between the cases because Benton, et al have the sole discretion to determine whether these machines are coin operated amusement devices. These machines provide amusement and they are coin operated. No special talent need be employed to conclude that they are "coin operated amusement devices".

On Page 28 of Petitioners' Brief they cite the case of *Gonzales, A. v. Ghingher,* 218 Md. 132, 145 A.2d 769, in which the refusal to license bloodless bull fights were overturned by the Maryland Court of Appeals. They cite this case because it involves the application of Article 15, Baltimore City Code (the license article) and they have erroneously concluded that the Court's holding in that case applies equally to Section 71, Article 15. Their reliance on this case is misplaced. As Judge Young

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pointed out in his opinion in the District Court, some sections of Article 15 require fixed standards for their enforcement and others such as Section 71 do not. In order to obtain a license under Section 71 the only standard which must be met is the payment of the licensing fee. Next the Petitioners argue that there should be some judicial review in cases where the license is revoked. Since there are no standards to meet, save the payment of the licensing fee, a judicial review of such cases would be meaningless. Judge Young found as a fact that there were no rules or regulations promulgated under Article 15 for enforcement and collection of fees (A. 5) and found as a matter of law that the failure to pay the licensing fee would be the only legitimate reason for revoking a license pursuant to Article 15, Section 71, Baltimore City Code, (A. 10).

III.

The Petitioners argue that they are being taxed by Baltimore City under Article 32, Section 149, Baltimore City Code. Section 149 was added to Article 32, Baltimore City Code by Ordinance No. 811, approved February 26, 1975, nearly a year and one half after Judge Young's decision in the case at bar. Since it was not passed until long after this case was decided by the Federal District Court it is irrelevant to the issues presented here.

Finally, the Petitioners have branded Section 71 as "prohibitory" and have suggested that the licensing fee is disproportionate to their earnings. They suggest that the payment of this licensing fee is a hardship because it amounts to six hundred individual $.25 "peep show" transactions. This ignores the fact that a customer transacting business on one of these machines must insert a series of quarters in order to receive the

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ultimate "amusement" potential which he (and the exhibitor) desires. See the description of these machines in *Sanza v. Md. Board of Censors,* 245 Md. 319, at pages 327, 328 and 331. In any event, no proof was offered to suggest that the licensing fee is confiscatory. Judge Young found as a fact that the record was silent as to the income from the machines and lacked any data to show that a tax of $150.00 was truly prohibitive, (A. 4).

CONCLUSION

For the reasons stated herein the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BENJAMIN L. BROWN,
City Solicitor,
AMBROSE T. HARTMAN,
Deputy Solicitor,
HARRY S. SWARTZWELDER, JR.,
Associate Solicitor,
RICHARD K. JACOBSEN,
Chief Solicitor,
Attorneys for Respondents.

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